PP

v.

RIFKEE ABU BAKAR

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CRIMINAL TRIAL NO: 45-20-2000]
16 JANUARY 2003

CRIMINAL LAW: *Penal Code - Section 304 - Culpable homicide not amounting to murder - Whether offence established*

CRIMINAL LAW: *Private defence - Whether ingredients of defence established - Penal Code ss. 96, 99, 102 - Evidence Act 1950 ss. 3, 105*

CRIMINAL PROCEDURE: *Sentence - Principles - Circumstances to consider - Culpable homicide not amounting to murder - First offender - Appropriate sentence*

EVIDENCE: *Witnesses - Impeachment of - Procedure applicable - Whether there were material discrepancies between testimony and former statements - Evidence Act 1950 s. 155(c)*

The accused, who had been charged with murder, was subsequently charged with culpable homicide not amounting to murder after amendments were made to the charge. His defence was one of private defence. The learned deputy public prosecutor made two applications to impeach the accused, based, firstly, on inconsistencies between his testimony and his cautioned statement and secondly between his testimony and his former statement in the police report.

Held (convicting the accused):

[1] The procedure for impeachment is that the court reads the former statement and then rules, affirmatively or otherwise, on the alleged material discrepancy. If the court finds that there is no serious or material discrepancy, the impeachment exercise will there and then end. Only if the court finds that the difference is so material as probably to amount to a discrepancy affecting the credit of the witness will the witness be asked whether he made the former statement, and then only if the witness denies having made it will the impeaching party be required to prove the former statement of the witness. Proof of the former statement comes after a ruling that there is a serious or material discrepancy.
(p 623 d-e)

[1a] On the facts there was no serious discrepancy between the accused person's testimony and his cautioned statement. However with regard to his testimony and the police report there were discrepancies that were so material as to amount to a discrepancy affecting the credit of the accused. (pp 611 e-g, 612 e-f & 614 g-h)

[2] Section 102 of the Penal Code provides that the right of private defence commences as soon as reasonable apprehension of danger to the body arises from any attempt or threat to commit the offence, and it continues as long as such apprehension of danger to the body continues. It is not necessary for the accused to find himself afflicted with serious injury before the right of private defence is justified. (p 628 g-h)

[2a] The burden of proving private defence rests on the accused by virtue of s. 105 of the Evidence Act. The burden imposed by s. 105 cannot be anything less than proof in accordance with s. 3, which means that the accused in relying on any defence would have the legal burden to prove such defence on a balance of probabilities. (p 632 a-b)

[2b] The facts reveal that it was the accused who started the fight. He had disentangled himself, but then went to the car to take the knife. There was no danger faced by the accused. There was no reasonable apprehension of death. The deceased was not armed – only the accused was. The accused could not have acted in self defence. The force used by the accused was not reasonable in the circumstances. The accused had exceeded his right. On the balance of probabilities therefore the accused had not proved private defence. (pp 637 h-i, 638 d-e & 639 f-g)

[3] The accused is a first offender but given the gravity of the offence that the accused is a first offender counts little. On the facts and in circumstances the right and proper sentence is a term of imprisonment of 8 years. (p 640 h)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors and Another Appeal [1995] 3 CLJ 639 CA ***(refd)***

Ahmad Din & Ors v. PP [1962] MLJ 94 ***(refd)***

Che Omar Mohd Akhir v. PP [1999] 2 CLJ 780 CA ***(refd)***

Dato Mokhtar Hashim & Anor v. PP [1983] 2 MLJ 232 ***(refd)***

Hashim Mat Isa v. PP [1950] MLJ 94 ***(refd)***

Idu Beng [1881] 3 All 776 ***(refd)***

Ikau Anak Mail v. PP [1973] 2 MLJ 153 ***(refd)***

Jayasena v. R [1970] 1 All ER 219 ***(foll)***

Joginder Singh v. PP [1984] 2 MLJ 133 ***(refd)***
Juraimi Husin v. PP [1998] 2 CLJ 383 CA ***(refd)***
Krishnan & Anor v. PP [1981] 2 MLJ 121 ***(refd)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 SC ***(refd)***
Kwang Boon Keong Peter v. PP [1998] 2 SLR 592 ***(refd)***
Kurup v. PP [1934] MLJ 17 ***(refd)***
Lai Kim Hon & Ors v. PP [1981] 1 MLJ 84 ***(refd)***
Lee Thian Beng v. PP [1973] 1 MLJ 248 ***(foll)***
Lee Fah Sang v. PP [1967] 2 MLJ 163 ***(refd)***
Lee Peng Kong v. PP [1986] 2 CLJ 139 HC ***(refd)***
Lee Yoke Choong v. PP [1964] MLJ 138 ***(refd)***
Low Oi Lin v. R [1949] MLJ 210 ***(refd)***
Lim Heng Soon & Anor v. PP [1970] 1 MLJ 166 ***(refd)***
Lim Young Sen v. PP [1994] 2 SLR 257 ***(refd)***
Mohamed Kunjo v. PP [1978] 1 MLJ 51 ***(refd)***
Mohamed Jusoh Abdullah & Anor v. PP [1947] MLJ 130 ***(refd)***
Muthusamy v. PP [1948] 14 MLJ 57 ***(foll)***
Norliana v. PP [2001] 1 CLJ 36 HC ***(cit)***
Othman Ahmad v. PP [1970] 2 MLJ 176 ***(cit)***
Palmer v. R [1970] AC 814 ***(refd)***
PP v. Khairuddin [1982] 1 MLJ 331 ***(refd)***
PP v. Jafa Daud [1981] 1 MLJ 315 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 SC ***(refd)***
PP v. Mohamed Ali [1962] MLJ 257 ***(refd)***
PP v. Mohd. Ali bin Abang & Ors [1994] 2 MLJ 12 ***(refd)***
PP v. Mohd Nooh bin Yusof & Ors [Malall's Digest ibid para 2918] ***(refd)***
PP v. Yap Huat Heng [1985] 2 MLJ 414 ***(refd)***
PP v. Adam Mohamad [Mallal's Digest 4th Edn 1997 Revised para 2908] ***(refd)***
R v. Kenneth John Ball 35 Cr App R. 164 ***(refd)***
R v. Murukaiyan Raso [1957] MLJ 26 ***(refd)***
Reg v. WN Hammar [1958] 24 MLJ 4 ***(refd)***
Sainal Abidin Mading v. PP [1999] 4 CLJ 215 CA ***(refd)***
Sim Bok Huat Royston v. PP [2001] 2 SLR 348 ***(refd)***
Somwang Phattanasaeang v. PP [1992] 1 SLR 850 ***(refd)***
Syed Abdul Aziz & Anor v. PP [1993] 3 SLR 534 ***(refd)***
Tham Kai Yau & Ors v. PP [1977] 1 MLJ 174 ***(refd)***
Virsa Singh AIR [1958] AIR SC 465 ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***
Ya Daud v. PP [1996] 2 CLJ 540 HC ***(foll)***
Yap Teng Chai v. PP [1959] MLJ 205 ***(refd)***
Yusof A Samad v. PP [2000] 4 SLR 58 ***(refd)***
Yusof Omar v. PP [2001] 3 CLJ 122 CA ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 112
Evidence Act 1950, ss. 3, 105, 153, 155(c)
Penal Code, ss. 96, 99, 102, 299, 300, 302

Penal Code [India], s. 304

Other source(s) referred to:
Adrian Keane, *The Modern Law of Evidence*, 5th edn, p. 87
*Halsbury's Laws of England***,** Hailsam edn, vol 9, para. 365
Ratanlal & Dhirajlal's Law of Crimes, 25th edn, vol 1, p. 355

For the prosecution - Haslinda Abu Bakar, DPP
For the accused - Teh Poh Teik; M/s Teh Poh Teik & Co

Reported by Mariette Peters-Goh

JUDGMENT

Jeffrey Tan J:
Trial commenced against the accused on the following charge.

> Bahawa kamu pada 6.5.2000 jam lebih kurang 8.45 malam di lorong belakang Restoran Banafe Jalan Abdullah di dalam Daerah Muar, di dalam Negeri Johor Darul Takzim telah melakukan kesalahan BUNUH dengan menyebabkan kematian Chandrashekar a/l Ponusamy (No. KPT 550911-01-5331) iaitu satu kesalahan yang boleh di hukum di bawah Seksyen 302 Kanun Seksaan."

11 witnesses testified for the prosecution. Their testimony may be summarised as follows. At 9.01 pm, on 6 May 2000, Inspector Cyril Edward (SP1, who was on duty at the Bilik Gerakan IPD Muar) received a telephone call from a member of the public who said that 2 persons of Indian descent had been stabbed, at Jalan Abdullah near Sahara Hotel. Having reduced that information into Muar Report 3080/00 (P4), he then informed Chief Inspector Idris bin Abdul Rahman (SP11) of that report.

SP11 testified that SP1 informed him of P4, at about 9.10 pm on 6 May 2000. He proceeded to the scene with a police photographer (SP3 - Lance Corporal Abdul Malek bin Ismail) and Lance Corporal Razman bin Nikmat. They reached the back of Restoran Banafe, Jalan Abdullah at 9.20 pm. Restoran Banafe was still open for business. The internal and external lights of Restoran Banafe were on. There were bloodstains on the road, about 5 meters from the rear door of Restoran Banafe. The victims were not there. SP3 took 4 photographs [P12(1-4)] of the bloodstains and of the scene. He drew a sketch plan (P16) of the

scene. With Lance Corporal Razman, he then proceeded to the Muar District Hospital. There, he saw one Kasim bin Mohd Ali (Kasim) and one Chandrashekar a/l Ponusamy (Shekar). Kasim had a cut on the palm of his left hand. He interviewed Kasim. Shekar had cuts on his left back and left shoulder, on his neck below his left ear, on the side of his right ear, and on his left chest. Shekar could not speak. He could not interview Shekar. On the same night, at 11.30 pm, at Jalan Mariam, Muar, he arrested the accused and one Talhah bin Abdullah. Both the accused and Talhah had no injuries on them. There were bloodstains on the shoes worn by the accused. He took possession of those shoes. After questioning the accused, he and his police party and accused then proceeded to 350-1, Jalan Salleh, Muar. The house was not locked. The entire party entered the house. He took possession of a t-shirt stained with blood that was in the kitchen. The entire party then proceeded to Jalan Sungai Abong, Muar. In a drain along Jalan Sungai Abong, was a knife. SP3 took 2 photographs [P12 (5-6)] of the knife in the drain. He retrieved that knife (P7B). The entire party then returned to the Muar Police station, whereat he lodged his reports and marked the exhibits. At 10.30 am on 8 May 2000, at the Muar Hospital Mortuary, he and SP6 identified Shekar to SP7. SP7 handed Shekar's clothes to him. On 15 May 2000, he handed the exhibits to a government chemist for examination. On 14 July 2000, the government chemist returned the exhibits to him. On 4 April 2000, he served a copy of the chemist's report (P22) and a copy of the post mortem report (P15) on the accused. On 27 July 2000, he deposited all exhibits at the exhibits Store.

Under cross-examination, SP11 testified that from his investigation, he found that the accused had sent Kasim to the hospital. The accused and Talhah were suspects. At 11am on 16 May 2000, he recorded a s. 112 statement from Talhah. He had not coached Talhah to make his statement. On 12 May 2000, he recorded the caution statement (D24 - tendered by the defence through SP11) of the accused. He carried out visual investigations at the back of Restoran Banafe. At the back of Restoran Banafe was a kitchen. Beside the rear door of Restoran Banafe was a sink. He could not say if there was any "kaca botol" at the back of Restoran Banafe. Talhah was present when the police were inside 350-1, Jalan Salleh, Muar. When he was arrested, the accused did not complain that he was injured, and did not ask to be sent to the hospital. The police had not assaulted the accused. Talhah could not have witnessed such an incident. He had no knowledge that the elder brother of the accused reported that the police had assaulted the accused. Under re-examination, SP11 testified that he was not the investigation officer of the reports lodged by the brother of the accused, and that he had not received those reports. There were "kaca botol" on the bloodstains.

Lance Corporal Abdul Malek bin Ismail (SP3) testified that at about 9.10 pm on 6 May 2000, he was instructed to follow SP11. At 9.20 pm, they (SP11, SP3 and Lance Corporal Razman bin Nikmat) reached the back of Restoran Banafe. There, he took 4 photographs [P12(1-4)]. SP3 further testified that as instructed by SP11, he took photographs P12(5-6) and P12(7-9) (SP11 testified that he instructed SP3 to take those photographs). SP3 was not cross-examined.

Lance Corporal Abdul Kadir bin Haji Abu Hassan (SP4), also a police photograher, testified that on 8 May 2000 and at about 10.30 a.m, at the mortuary, he took 7 photographs [P13(1-7)] of the deceased and his clothes. SP4 was not cross-examined.

Lance Corporal Ismail bin Nong (SP5) testified that at 9.35 pm, on 7 May 2000, whilst he was on duty at the enquiry office, IPD Muar, he received a telephone call from one Mansor of the Muar District Hospital, who said that Shekar had passed away. He reduced that information into Muar Report 3094/00 (P14). SP5 was not cross-examined.

The next witness was one Krishnan a/l Ponusamy Packirey (SPG) who testified that Shekar was his younger brother, and that he identified the body of his younger brother to Dr Ashraf bin Md Razi (SP7) and SP11.

Dr Ashraf bin Md. Razi (a government doctor who was a medical officer at the Muar District Hospital at the material time) testified that at 11pm, on 6 May 2000, he examined one Chandrashekar a/l Ponusamy KPT 550911-01-5331. Shekar was "dalam kesakitan yang amat sangat. Saya dapati patient mempunyai banyak luka di beberapa bahagian badan" - over the face, left side of the chest, back of left shoulder and one on the left loin. The incise wounds were sutured. Shekar was left in the ward for observation. At 5pm on 7.5.2000, he was summoned to attend to Shekar who suddenly "went into shock". Shekar's pulse was weak and his blood pressure was low. Shekar had difficulty in his breathing. Emergency treatment was given, but Skekar did not respond. Shekar died at 6.40pm on 7.5.2000. On 8 May 2000, SP6 and SP11 identified Shekar to him. He performed the post-mortem. Shekar died from secondary shock due to a cut colon. P13(b) is a picture of that wound that extended to the cut colon. That wound that extended to the colon was 6 cm x 5 cm and 16 cm deep. P7B could cause that 6 cm x 5 cm x 16 cm wound. "Biasanya, kecederaan , yang dialami olek mangsa boleh membawa kematian." Altogether, there were 11 external wounds.

Under cross-examinaton, SP7 testified that blood samples were taken from Shekar to test, amongst others, for alcohol content. The result of the chemist was that there were a high level of alcohol in the blood of Shekar - 150 mg

of alcohol per 100 ml of blood. Shekar was aggressive during examination. If the cut colon had been sutured, Shekar could have been saved. Under re-examination, SP7 testified that he believed that Shekar was aggressive because he was in extreme pain.

Chief Inspector Abdullah Sani bin Ramil (SP8) testified that on 16 May 2000 he conducted the identification parades, and that in those parades, Kasim and Shanti a/p Petham identified the accused. SP8 was not cross-examined.

The key witness for the prosecution was a bar waitress, one Santhi a/p Petham (SP10), who testified that Kasim and Shekar were her friends. At 8pm, on 6 May 2000, she was at the back of Restoran Banafe, with Kasim and Shekar. "Kami bertiga sedang minum arak." They were seated on a table by the side of the back of Restoran Banafe. They had been there for about 1/2 an hour. "Lepas itu berlaku pergaduhan. Semasa kami bertiga sedang minum, tiba-tiba datang 3 orang [lelaki], iaitu termasuk [OKT]. " They arrived in a van. They parked the van at the place reserved for motorcycles. "Saya nampak ketiga mereka turn dari kereta. Mereka terus pergi ke Kasim untuk bergaduh. Pada masa itu Kasim duduk sebelah saya ... Mula-mula mereka pergi kepada Kasim dan berlaku pergaduhan mulut sahaja". " ... Kasim berkata kepada mereka biarkan kita uruskan dengan baik." The accused was not placated. The accused took a knife from the van. "Lepas itu dia pergi kepada Shekar, terus tikam Shekar ... di bahagian bawah dada kiri. Saya tak pasti beberapa kali tikam berlaku, kerana keadaan gelap. Selepas tikam [OKT] pergi kepada Kasim, Kasim pun kena tikaman. Kasim pun jatuh pengsan. Lepas it [OKT] mengangkat Kasim dan membawa masuk ke dalam satu van hantar ke hospital". Later, when she was at the police station lodging her report, she encounted the accused who informed her that he (accused) had sent Kasim to the hospital. Shekar was sent to the hospital by the public. Restoran Banafe was open for business at the material time. Its lights were lit. The external lights at the rear of Restoran Banafe were also lit. The lights in the adjoining buildings were not lit. They were seated about 12 feet from the rear door of Restoran Banafe. "2 lagi yang datang tidak terlibat dalam pergaduhan. Mereka cuma meleraikan sahaja. [OKT] yang mulakan pergaduhan mulut. [OKT] bermula dengan berkata. ' awak ini besar sangat kah' kepada Kasim ... Kasim turun dari meja dan berkata kepada [OKT] supaya bersabar. She did not hear the rest. "Lepas itu berlaku pergaduhan diantara [Kasim dan OKT]. Pergaduhan bermula dengan tumbukan. [OKT] yang bermula menumbuk Kasim, [OKT] pergi ke kereta, ambil pisau, datang kepada Kasim dan terus tikam Kasim di tapak tangan, kemudian di bahu kiri, di bahagian dada. Lepas itu saya tak nampak apa yang berlaku kepada Kasim. Pada masa itu Shekar pun berada, dan Shekar pun kena tikam. Kasim kena tikam dahulu." She gave her statement to the police when

events were still fresh in her mind. She could still recall those events. "Semasa pergaduhan sedang berlaku, Kasim meminta saya memanggil polis ... Sebelum saya keluar untuk menalifon polis, saya telah menyaksi apa yang saya kata tadi ... Saya nampak dengan jelas [OKT] yang menikam Kasim. Jarak saya ke Kasim ditikam adalah lebih kurang 12 kaki. Saya nampak dengan jelas [OKT] yang menikam Shekar. Jarak saya dengan tempat dimana Shekar ditikam adalah lebih kurang 12 kaki. Saya nampak dengan jelas pisau tersebut. Pisau itu panjang 12 inci termasuk pegang. Pisau itu sebelah atas bergigi . [P7B] adalah pisau yang saya nampak pada malam itu. She knew the accused before the incident. Restoran Banafe belonged to the family of the accused. Each night the accused would be at Restoran Banafe. At an identification parade held on 16 May 2000, she identified the accused as "orang yang melakukan pembunuhan".

Under cross-examination, SP10 testified as follows. There were two other persons. She could not identify them. But she could identify the accused as she had seen him before. She had not seen Talhah before. She could not say if Talhah was present during the incident. After being to the police station, she went to the hospital, where she saw Kasim and Shekar. She spoke to them, but they could not answer her. Shekar had an injury below his left chest, whilst Kasim had injuries on his shoulder, chest and palm of his hand. Twice she visited Kasim and Shekar. On both occasions, they could not speak. Kasim and Shekar were her clients at the bar and outside. "Saya sayang Kasim. Saya anggap Shekar sebagai abang saya." She was frequently at the back of Restoran Banafe. At the back of Restoran Banafe was a surau. She had never entered the surau. Whilst she was drinking with Kasim and Shekar, the door of the surau was not open.

D/C: Saya kata, tidak benar OKT ... turun dari kereta dan terus pergi ke Kasim bergaduh dengan Kasim.

Saya katakan OKT keluar dari Restoran Banafe hendak pergi ke bar and pada masa sama melihat kamu mereka minum arak dekat pintu surau"

SP10: Tidak setuju

SP10 continued her testimony as follows. There was only one bottle of liquor. They had not been drinking elsewhere. '"Kasim langsung tidak minum. Shekar ada minum sebelum datang ke tempat kejadian. Di tempat kejadian Shekar belum minum."

D/C: Saya kata, pada malam OKT keluar dari Restoran dan pada masa itu nampak Kasim berdiri, manakala kamu and Shekar duduk.

SP10: Tidak setuju. Sebenar, Shekar yang berdiri, Kasim masih duduk di sebelah saya.

D/C: Pada masa itu OKT berkata baik-baik kepada Kasim janganlah minum arak dekat tempat suci, ini surau, pergilah ke tempat lain untuk minum arak.

SP10: Saya tidak setuju.

D/C: Pada masa itu Kasim tolak OKT dengan dua tangan.

SP10: Tidak setuju.

D/C: Selepas itu, OKT berundur 1 atau 2 langkah ke belakang kerana ditolak

SP110: Tidak setuju.

SP10: OKT bukan datang dari Restoran, tetapi dari kereta.

D/C: Saya kata, pada masa yang sama, Talhah keluar dari belakang Restoran dan nampak pergaduhan.

SP.10: Saya tak berapa cam Talhah, saya tidak kenal dia.

D/C: Saya katakan Talhah ada di sana. SP10: Tidak boleh cam.

D/C: Kamu tidak pasti samada Talhah ada atau tidak di tempat semasa kejadian.

SP10: Tak pasti.

D/C: Saya katakan, selepas Kasim tolak OKT, Shekar dengan botol, menghayun ke rusuk OKT dan kena OKT.

SP10: Saya nampak Shekar mengambil botol, tetapi saya tidak nampak samada Shekar pukul atau tidak.

D/C: Saya kata selepas dipukul dengan botol, OKT berbongkok dan dengan tangan memegang dan dipukul.

SP10: Saya nampak Shekar sahaja yang berbongkok-bongkok.

D/C: Selepas itu kedua Kasim dan Shekar serang OKT dengan tumbuk dan tumbuk.

SP10: Tidak setuju, sebaliknya OKT yang memukul Shekar dan Kasim.

D/C: Pada masa itu, Talhah cuba melerai Kasim.

SP10: Ada orang dapat meleraikan, tetapi saya tidak dapat cam orang itu.

D/C: Sebab gelap SP10: Benar

D/C: Pada masa itu kamu telah berlari ke tempat lain,

SP10: memang saya ada berlari, untuk menelifon.

D/C: Sebelum kamu berlari dari tempat kamu juga melihat Kasim dan Shekar bertumbuk dan bertendang OKT sampai OKT Jatuh ke tanah.

SP10: Tidak lihat.

D/C: Pada masa itu Shekar banyak ganas, sebab dia sudah banyak minum.

SP10: Setuju

In her testimony in the afternoon, SP10 maintained it was Kasim who beseeched her to call for the police. She telephoned for the police from a public telephone in front of the Sahara Hotel.

D/C: Saya kata selepas kamu melihat Shekar dan Kasim serang OKT, dan bila OKT jatuh, awak telah berlari untuk telefon, dan lepas awak tidak menyaksi kesemua yang berlaku.

SP10: Tidak setuju.

D/C: Kamu tidak lihat Shekar atau Kasim tumbuk OKT.

SP10: Tidak lihat.

D/C/: Kamu tidak lihat Shekar atau Kasim tendang OKT.

SP10: Tidak lihat.

D/C: Saya kata, tidak benar OKT dengan 2 orang lagi, pergi ke Kasim dan bergaduh.

SP10: Tidak setuju.

D/C: Semua yang kamu kata dikatakan oleh OKT tidak benar.

SP10: Tidak setuju, memang ada dengar.

D/C: Saya kata, Kasim tidak kata 'supaya sabar'.

SP10: Tidak setuju.

D/C: Saya kata pada masa itu Kasim juga bertindak kasar sebab itu juga ada minum.

SP10: semua tidak setuju.

D/C: Saya katakan OKT tidak mulakan tumbuk-tumbuk.

SP10: Tidak setuju.

SP10 disagreed with learned counsel who proposed, that the accused had not gone to any vehicle and had not taken a knife from a vehicle, that it was not true that "OKT terus tikam Kasim", that she testified that the accused stabbed Kasim and Shekar only because she saw the injuries on them, that she was not present at the point when Kasira and Shekar were stabbed. She said she saw Kasim and Shekar being stabbed. She had not been coached by the police to testify that the accused stabbed Kasim and Shekar.

In re-examination SP10 said that they (SP10, Kasim and Shekar) were not seated in front of the door to the surau. She maintained that accused arrived in a vehicle with 2 other persons, that she witnessed the incident before she telephoned for the police, that she witnessed the "pergaduhan" between Kasim and the accused, that she saw the accused stabbing Shekar, that she did not see Kasim pushing the accused, that she did not see Kasim and Shekar attacking the accused, that she is certain that the accused had taken a knife from a vehicle, that she witnessed the entire incident and not just that she saw the injuries at the hospital. SP10 said that she was giving her evidence on the basis of what she witnessed and not because of her relationship with Kasim or Shekar.

In his short submission at the close of the prosecution case, Mr Teh Poh Teik for the accused, submitted that SP10 was the only eye witness but that there was no credible evidence of an offence under s. 302 of the Penal Code. Mr Teh contended that it was clear from the caution statement of the accused that Kasim and Shekar attacked the accused, and that the accused procured a knife from the kitchen. He said, "there is only a prima facie case under section 304 Part II". In her equally short submission at the close of the prosecution case, Miss Haslinda binte Abu Dakar, the learned Deputy Public Prosecutor, contended that death was caused by the accused, and that there was intention or knowledge. The learned DPP submitted that the use of a dangerous weapon leads to an irresistible inference of the intention to cause death. The learned DPP further contended that the knife in question is not an ordinary knife, and that the prosecution had made out a case of murder.

Under the Penal Code, it is not apposite to say that murder has the meaning commonly attached to it throughout the ages, namely, an unlawful killing with malice aforethought. For the word murder in the Code has that meaning ascribed to it in ss. 299 and 300 of the Code. And that meaning of murder must be

gathered first from the definition of culpable homicide, which is committed by "whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death" (section 299 of the Penal Code). But not every case of culpable homicide is murder, for "under the category of culpable homicides fall both cases of culpable homicide amounting to murder and those not amounting to murder" (*Ratanlal & Dhirajlal's Law of Crimes* 25th edn p 1296). "Culpable homicide is murder (a) if the act by which the death is caused is done with the intention of causing death; (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; (c) if it is done with the intention of causing such bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid" (s. 300 of the Penal Code). "Where there is an intention to kill, the offence is always murder ... The offence is murder, if the offender knows that the particular person injured is likely, either from peculiarity of constitution or immature age, or other special circumstances to be killed by an Injury which would not ordinarily cause death ... The offence is culpable homicide, if the bodily injury intended to be inflicted is likely to cause death; it is murder if the injury is sufficient in the ordinary course of nature to cause death ... it is culpable homicide if the act by which death is caused is done with the knowledge is that the act is likely to cause death but murder if if it done with the knowledge that death is the probable result" (paraphrased from *Ratanlal & Dhirajlal ibid* pp. 1292 - 1294). "Putting it shortly, all acts of killing done with the intention to kill, or to inflict bodily injury likely to cause death, or with the knowledge that death must be the probable result, are *prima facie* murder, while those committed with the knowledge that death will be a likely result are culpable homicide not amounting to murder" (per Straight J, in *Idu Beg* [1881] 3 All 776, 778, and quoted in *Ratanlal & Dhirajlal ibid* p. 1296). "A bare killing, without proof of intention or knowledge as required by that section, can never be murder. It is not sufficient for the prosecution to prove merely the killing, without proving intention or knowledge as required by that section set out in that definition ..." (*Hashim bin Mat Isa v. PP* [1950] MLJ 94 at 95 per Willan CJ). "The prosecution must ... bring the case under any of the 4 clauses of s. 300, to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any of the 4 clauses of s. 300 ... the charge of murder would not be made out and the case may be one of

culpable homicide not amounting to murder as described under s. 299" (*Kishore Singh* AIR 1977 SC 2267, and quoted in *Ratanlal & Dhirajlal ibid* p. 1296). Yet culpable homicide, even if within cls. (a) to (d), is not murder, when it is brought within the five exceptions to s. 300. "The correct approach to the application of [ss. 299 and 300] is this. Section 299 clearly defines the offence of culpable homicide. Culpable homicide may not amount to murder (a) where the evidence is sufficient to constitute murder, but one or more of the exceptions to s. 300, Penal Code apply, and (b) where the necessary degree of mens rea specified in s. 299 is present, but not the special degrees of mens rea referred to in s. 300 Penal Code. We would like in this connection to express the need to bear in mind that all cases falling within s. 300, Penal Code must necessarily fall within s. 299, but all cases within s. 299 do not necessarily fall within s. 300" (*Tham Kai Yau & Ors v. PP* [1977] 1 MLJ 174, 176, per Raja Azlan Shah FJ, as HRH then was).

It has often been observed, that it is difficult if not impossible to procure direct evidence to prove the intention of an individual (*Lee Fan Sang v. PP* [1967] 2 MLJ 163; *Lim Heng Soon & Anor v. PP* [1970] 1 MLJ 166; *Lai Kim Hon & Ors v. PP* [1981] 1 MLJ 84; *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232; *Khoo Hi Chiang v. PP* [1994] 2 CLJ 151). Hence "intention is a matter of inference " (*Tham Kai Yau & Ors v. PP (supra)* at 176, per Raja Azlan, Shah FJ, as HRH then was). "A man's intention is a question of fact and it can be gathered from his acts" (*Ratanlal & Dhirajlal ibid* p. 1296). Intention can be inferred from the act or conduct or other relevant circumstances of the case (*Juraimi Husin v. PP* [1998] 2 CLJ 383). Intention to kill can be inferred from the nature of the injuries sustained by the deceased (*Sainal Abidin Mading v. PP* [1999] 4 CLJ 215). "Intention must be inferred not merely from the natural consequences of his act, but from the act itself, and as the natural consequence of an act of the kind in question would be death" (*Ratanlal & Dhirajlal ibid* p. 1304). "If there is no intention to kill, then it can be murder only if (i) the accused knew that the injury inflicted would be likely to cause death, or (ii) that it would be sufficient in the ordinary course of nature to cause death, or (iii) that the accused knew that the act must in all probability cause death. If the case cannot be placed as high as that and the act is only likely to cause death and there is no special knowledge, the offence comes under s. 304 (Part II) of the Indian Penal Code" (*Ratanlal & Dhirajlal ibid* p 1302).

In Rajwant Singh AIR 1966 SC 148, the Indian Supreme Court stated:

> The 3rd clause [of section 300] discards the test of subjective knowledge. It deals with acts done with the intention of causing bodily injury to a person and the bodily injury inflicted is sufficient in the ordinary course of nature

to cause death. In this clause the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature, the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not.

Vivian Bose J, in the leading case of *Virsa Singh* AIR 1958 SC 465, further explained cl. 3 of s. 300 as follows:

To put it shortly, the prosecution must prove the following facts before it can bring a case under section 300 'thirdly'.

First, it must establish, quite objectively that a bodily injury is present;

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict the particular bodily injury, that is to say that it was not accidental or unintentional, or that some other kind of injury was intended;

Once these three elements are proved to be present, the enquiry proceeds further and

Fourthly, it must be proved that the injury of the type just described (and, of course, the burden is on the prosecution throughout) the offence is murder under section 300 'thirdly', It does not matter that there was no intention to cause death. It does not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (not that there is any real distinction between the two). It does not even matter that there is no knowledge that an act of the kind will be likely to cause death. Once the intention to cause bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death.

Ratanlal & Dhirajlal ibid pp. 1310 - 1313 further stated as follows:

This clause [3] states that where bodily injuries intended to be inflicted are sufficient in the ordinary course of nature to cause death the offence falls under this clause. The distinction between this clause [3] and clause (2) of section 299 depends upon the degree of probability of death from the act committed. If from the intentional act of injury committed the probability of death resulting is high, the finding should be that the accused intended to cause death or injury sufficient in the ordinary course of nature to cause death and the conviction should be of murder; if there was probability in a less degree of death ensuing from the act committed, the finding should be that the accused intended to cause injury likely to cause death and the conviction

should be culpable homicide not amounting to murder. It is not correct to say that an injury sufficient in the ordinary course of nature to cause death is an injury, which inevitably and in all circumstances must cause death. If the probability is very great, the requirements of this clause are satisfied, and the fact that the particular individual may by the fortunate accident of his having secured specially skilled treatment, or being in possession of a particularly strong constitution has survived an injury which could prove fatal to the majority of persons subjected to it, is not enough to prove that such an injury is not sufficient in the ordinary course of nature to cause death. If a person knowingly causes injuries which are more likely to cause death that not in the ordinary way, his offence falls under either the second or third clause ...

When there are several injuries, and even if none of the injuries is sufficient in the ordinary course of nature to cause death of the deceased but cumulatively they are sufficient to cause death, the offence will be murder and not culpable homicide not amounting to murder in the case of some classes of injuries, it Is easy to say what was intended; for instance, in a wound with a knife in the abdomen. A man who inflicts such a wound intends to inflict a wound which he must know will be dangerous to life ... A Judge must always find whether the bodily injury inflicted was that which was intended by the accused. The nature of the offence does not depend merely on the location of the injury caused by the accused. The intention of the person causing the injury must be gathered from a careful examination of all the facts and circumstances of each given case ...

The emphasis in the clause is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death, in the ordinary way of nature. When this sufficiency exists and death follows and the causing of such injury is intended, the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant ... The nature of the material object used and the force used as useful guides in arriving at a decision as to whether the intention and knowledge required by the section can be attributed to the accused ...

... Each case would depend on its own facts and circumstances ...

Where there was no premeditation, and in the course of a sudden quarrel on a trivial issue, a young man, had given only one blow to the deceased, section 300 firstly and thirdly were not attracted and his conviction under section 302 was altered to section 304, Part II, as he could be imputed with the knowledge that he was likely to cause an injury which was likely to cause death.

Whether it was sufficient to cause death in the ordinary course of nature is a matter of inference or deduction from the proved facts about the nature of the injury and has nothing to do with the question of intention.

On stabbing wounds, *Ratanlal & Dhirajlal ibid* pp 1315 - 1316 had this to say:

> ... Where the accused inflicted a stab with a sharp-pointed weapon which entered the upper part of the deceased's stomach, causing rupture of it and of the peritoneum, it was held that his act came within this clause. If a person stabs another in the abdomen with sufficient force to penetrate the abdominal wall and the internal viscera, he must undoubtedly be held to have intended to cause injury sufficient in the ordinary course of nature to cause death. It is not necessary that the accused must have the intention to inflict those injuries which he knew were sufficient in the ordinary course of nature to cause death. It would suffice if he intended to cause those injuries which were actually caused by him. If the medical evidence showed that those injuries were sufficient in the ordinary course of nature to cause death, the accused would then be guilty of murder under section 302 ...
>
> ... the person who uses a sword or aruval chopping of an arm of a leg and by doing so severs the arteries of the arms or the leg, must know that he is inflicting an injury which in the ordinary course of nature is sufficient to cause death. The offence in that case is clearly murder. Where the accused stabbed the deceased only once in a vital part of the body and the deceased died as a result of that injury and the injury was one which in the ordinary course would have caused death, it was held that the accused was guilty of murder.
>
> The mere fact that the deceased might have been saved if expert medical evidence had been afforded at once makes no difference as to the nature of the crime ...

As said, the existence of circumstances described in any of the five exceptions excuses an act which would otherwise be murder, to the extent that the act constitutes only culpable homicide not amounting to murder and murder. But in view of s. 105 of the Evidence Act 1950 (see *Mohamed Kunjo v. PP* [1978] 1 MLJ 51 where it was held by the Privy Council that the burden of proving exception four rests upon the accused), "the prosecution is not obliged to prove the absence of facts which might bring the case within a special exception of s. 300 of the Code, which the accused might set up in his defence. The accused is not also compelled to lead evidence to satisfy the court that the case was brought within [the exceptions]. All that may be necessary for the accused is to offer some explanation of the prosecution evidence, and if this appears to be reasonable, even though not beyond doubt, and to be consistent with the innocence of the accused, he should be given the benefit of it" (*Ratanlal & Dhirajlal ibid* p 1326).

Exception four provides that "culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, and without the offender having taken undue advantage or acted in a

cruel or unusual manner". "The word 'sudden' implies that the fight should not have been pre-arranged. A fight is not per se a palliating circumstance, only an unpremeditated fight is such. The lapse of time between the quarrel and the fight is, therefore, a very important consideration. If there intervenes a sufficient time for passion to subside and for reason to interpose, the killing will be murder. The occasion must not only be sudden but the party assaulted must be on an equal footing in point of defence, at least on the onset. This is peculiarly requisite where the attack is made with deadly or dangerous weapons. Where the deceased was unarmed and did not cause any injury to the appellant, the appellant following a sudden quarrel had inflicted fatal blows to the deceased, it was held that this Exception did not apply and his conviction under s. 302 must, therefore, be confirmed. Where in a sudden fight, the injury dealt by the accused by a sharp weapon had cut into the intestine, the court held that though an intention to cause death or such bodily injury as is likely to cause death cannot be attributed to him, knowledge is attributable to the accused that the injury by knife into the abdomen was likely to cause death. Considering that it was a case of sudden fight, the act of the accused would amount to culpable homicide not amounting to murder punishable under Part II of s. 304" (*Ratanlal & Dhirajlal ibid* p 1364). "If the weapon or manner of attack by the assailant is out of all proportion to the offence committed, the said circumstance can also go a long way in deciding whether undue advantage had been taken. The question as to whether the accused had taken undue advantage in any particular case is a question of fact" (*Ratanlal & Dhirajlal ibid* p. 1365). "The test of applicability of Exception Four could only arise if, after examining the facts of the case, it is found with reasonable certainty that there was a sudden fight or mutual quarrel" (*Ratanlal & Dhirajlal ibid* p. 1366). "When persons fight on fair terms, and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to occasion death, if death ensues - it is manslaughter; and if persons meet originally on fair terms, and after an interval, blows having been given, a party draws in the heat of blood a deadly instrument, and inflicts a deadly injury, it is manslaughter only" (*Ratanlal & Dhirajlal ibid* pp. 1366 -1367).

In the instant case, the unchallenged medical evidence led by the prosecution undoubtedly establised that Shekar had succumbed to a stab wound (6 x 5 x 16 cm) that ruptured his colon, and that that bodily injury is sufficient in the ordinary course of nature to cause death. The evidence of the eye witness (SP10) was that it was the accused who stabbed Shekar and Kasim with P7B. That evidence of the eye witness was challenged by learned counsel who proposed that SP10 had fled from the scene prior to the actual stabbing incident. But SP10's testimony was not shaken by all cross-examination. SP10 steadfastly maintained that it was the accused who stabbed Shekar with a knife taken from

a van. SP10 steadfastly maintained that she witnessed the entire stabbing incident. And there was no reason not to believe SP10. Counsel proposed that SP10 fled from the scene before any knife was drawn. But if that was true, then SP10 would not have seen the knife, and would not have been able therefore to describe the knife in question, which is not any ordinary kitchen knife. SP10 testified, "Saya nampak dengan jelas pisau tersebut. Pisau itu panjang 12 inci termasuk pegang. Pisau itu sebelah atas bergigi". And that knife (P7B) that the prosecution produced measures exactly 11 inches from hilt to tip, whilst the upper edge of the blade is serrated, just exactly as described by SP10. Hence SP10 would not have not been present when the knife was drawn, or else she would not have been able to describe that distinctive knife. And there was no reason not to believe that the knife that SP10 identified was not the knife in question, for the length of the blade (17 cm) was wholly consistent with it being the weapon that would have caused the 16 cm deep stab wound. That the bodily injury was 16 cm deep also went to show that Shekar must have been stabbed with considerable force and therefore with the intention to cause injury sufficient in the ordinary course of nature to cause death (*Ratanlal & Dhirajlal ibid* pp. 1315 - 1316 applied). The other incised wounds on Shekar evinced furthermore that the knife would have been used repeatedly. Therefore, there could be no doubt that the stab wound (6 x 5 x 16 cm) that ruptured the colon of Shekar would not have been accidental. And the intention could only have been to cause injury sufficient in the ordinary course of nature to cause death, for P7B is a most dreadful weapon - P7B will inflict injury both when thrust in and also when drawn out, to inflict maximum injury to the subject. Undoubtedy, there was a prima facie case under cl. 3 of s. 300. All except that it also appeared from the evidence of the same eye witness, that Exception Four to s. 300 applied.

As said, Exception Four provides that "culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel, without the offender having taken undue advantage or acted in a cruel or unusual manner", and "the test of applicability of Exception 4 could only arise if, after examining the facts of the case, it is found with reasonable certainty that there was a sudden fight or mutual quarrel" (*Ratanlal & Dhirajlal ibid* p. 1366). But there was no doubt that the incident in the instant case began with a quarrel, when all parties on the onset were not armed. According to SP10, "mula-mula mereka pergi kepada Kasim dan berlaku pergaduhan sahaja" "pergaduhan bermula dengan tumbukan", and that only later was the knife taken from a van. SP10 disagreed with learned counsel who proposed that Kasim pushed the accused and that Kasim and Shekar punched the accused. SP10 said, "sebaliknya, OKT yang memukul Shekar dan Kasim". Nevertheless, SP10 unraveled facts that were not inconsistent with there being

a fight. Counsel proposed that Shekar struck the ribs of the accused with a bottle. SP10 answered, "saya nampak Shekar mengambil botol, tetapi saya tidak nampak samada Shekar pukul atau tidak". Counsel proposed, "Talhah cuba melerai Kasim". SP10 answered, "ada orang dapat meleraikan, tetapi saya tidak dapat cam orang itu". There was no evidence that the fight had been prearranged. So it could not be said that the fight was not a sudden fight in the heat of passion upon a sudden quarrel. And there was no evidence that the party assaulted had not been on an equal footing in point of defence, at least on the onset. In fact, according to SP10, Shekar had a bottle in his hand. And there was no evidence that the accused had taken undue advantage, as the knife was procured after the initial fight and after Shekar had a bottle in his hand. "Considering that it was [not improbably] a case of sudden fight, the act of the accused would amount to culpable homicide not amounting to murder punishable under Part II of s. 304" (*Ratanlal & Dhirajlal ibid* p 1364 applied). Therefore, given the evidence, there was only a *prima facie* case of culpable homicide not amounting to murder punishable under Part II of s. 304. Accordingly, the charge was altered, and the accused was ordered to enter his defence on the following charge.

> That you on or about 6.5.2000, at 8.45 pm at the back lane of Restoran Banafe Jalan Abdullah, in the district of Muar, in the State of Negeri Johor Darul Takzim, caused the death of Chandrashekar a/l Ponusamy (No. KPT 550911-01-5331) with the knowledge that your act was likely to cause death and thereby caused an offence of culpable homicide not amounting to murder, punishable under section 304 Part II of the Penal Code.

The sworn testimony of the accused may be summarised as follows. On the night of 6 May 2000, he was working at Restoran Banafe - his eldest brother's restaurant. He started work at 8pm. He drove to Restoran Banafe in a van, with Talhah as his sole passenger. He parked the van behind the surau, near the pool of blood seen in photograph P12(1). That pool of blood was behind the spot where he parked his van. He parked the van and entered Restoran Banafe, with Talhah. He did not see anyone near the surau. The surau was meant for the use of the workers of Restoran Banafe and the public. "Lepas masuk restoran, saya buat kerja." Saya buat kerja cashier - kira duit belian barang-barang untuk restoran. Talhah keluar minum. Lepas itu saya pergi ke belakang kedai untuk mengambil cop getah restoran." The rubber stamp was inside the van. He saw three persons drinking liquor, about 2 or 3 feet in front of the door of the surau. One was standing while the others were seated. Kasim was standing. SP10 was seated. The other was a male. He had seen them before but did not know them.. ... There was a bottle of liquor. "Saya mendekati Kasim dan bercakap kepada dia, saya minta dia minum di tempat lain, kerana tempat itu adalah tempat suci". He spoke in a normal tone. He smelt liquor. Kasim straightaway pushed him on his chest. He felled back one or 2 steps.

He stretched out both his hands with open palms. Thereupon, Shekar struck him on his right ribs, with the bottle in his hand. He felt pain. He crouched down. "Simati dan Kasim memukul saya di bahagian belakang" - the accused pointed to the centre of his back and the back of his neck. He was kicked on his right thigh, and punched on his face, head, neck, and back. At that point, Talhah arrived. "Talhah cuba meleraikan Kasim. Masa itu saya jatuh. Saya lagi dipukul." He was kicked on his head and stomach. He managed to get onto his feet. He wanted to run to the restaurant. But as he was running to the restaurant, Shekar threw a bottle at him. He avoided the bottle thrown at him. There was a knife near the sink. "Saya terasa diri saya terancam, saya mengambil pisau itu, saya pusing depan simati. Masa itu, pisau di tangan saya, di tangan kanan saya. Saya melambai pisau dan kata jangan dekat, jangan dekat. Tetapi Kasim tetap menyerang saya. Shekar terus memegang tangan kanan saya, untuk mengambil pisau saya." He held on to the knife. "Waktu itu dalam keadaan tarik-menarik. Dalam proses tarik-menarik saya jatuh dan bergelut. Simati dan Kasim turut terjatuh bersama-sama saya. Saya berguling dengan simati. Saya dalam keadaan takut. Saya melihat simati berlari, dan Kasim terbaring berlumuran ... Semasa saya jatuh dalam keadaan tarik-menarik, pisau masih ada di tangan saya.".

In connection with the injuries sustained by Shekar, the accused testified, "pada bila-bila masa saya tidak tikam simati. Saya pegang pisau untuk mempertahankan diri dan kerana saya rasa nyawa terancam ... Simati ganas, agresif." In connection with the injuries allegedly sustained by himself, the accused testified, "Saya ada cedera. Saya dapat luka di bahagian kepala, tangan kanan (siku) badan bengkak-bengkak di belakang, di bahagian dada dan kaki kanan di bahagian peha".

The accused further testified that after he sent Kasim to the hospital, he was in a state of "keadaan panic dan takut, jadi pisau saya buang, sebab saya tidak pernah melakukan kes begini" (see p. 64 of the notes). He gave the statement in D24. Whilst he was detained, he was assaulted by the police. The knife was not taken from the van. He had not alighted from his van, with 2 other persons. After he alighted from the van, he had not proceeded straightaway to quarrel. During the quarrel, he saw SP10 leaving the scene.

Under cross-examination, the accused testified that prior to the incident he had been with Restoran Banafe for about 6 months. All workers of Restoran Banafe knew him. "Talhah adalah saudara saya. Talhah biasa datang ke Restoran Banafe. Talhah juga kawan baik saya". He arrived at the restaurant with Talhah. He parked his van near the spot where later was the pool of blood. The restaurant was opened for business at the material time. Inside the restaurant were numerous workers and patrons. The lights inside the restaurant were lit, but the external lights of the restaurant were not lit.

The accused agreed with the learned DPP that P7B was the knife in question, that he threw away that knife after the incident, that P10B was the pair of shoes he wore during the incident, that when he was arrested he was physically examined by SP11, that the sink was just 2 steps away from the rear door of the restaurant, that there were workers in the kitchen located at the rear of Restoran banafe, that if there had been a fight there would have been a loud commotion and the workers in the restaurant would have come to his assistance, that he stated in his statement (D24) that he ran into the restaurant and that the knife was taken from the kitchen, and that the person in photograph P13 (1-6) was the person "Yang kena P7B oleh kamu".

But the accused denied and or disagreed, that Shekar and Kasim were not seated outside the surau, that he said at the first instance he was in front of Shekar and Kasim "Kamu besar kah", that Kasim had not pushed him, that Kasim did not smell of liquor, that the knife was taken from the van and not from the sink, that the knife was not a kitchen knife, that he had stabbed Shekar several times, that he had stabbed Shekar or Kasim, that the holes in the clothing of Shekar (P9B) were as a result of Shekar being stabbed by him (accused), that there were no injuries on him when he was arrested, that he was not medically treated for the simple reason that there were no physical injuries on him, that since he sent Kasim to the hospital he could the same time have obtained medical treatment thereat if he had injuries on him, that he could have enlisted the assistance of the workers in the kitchen of the restaurant, that he was the attacker and not the one attacked, that Talhah had not come to his assistance, that the pool of blood was Shekar's pool of blood, that SP10 witnessed the entire incident before she departed from the scene, that he approached Kasim and Shekar with not the intention to stop them from drinking, that Kasim said "bersabar", that there was a verbal quarrel between him and Kasim, that that verbal quarrel was placated by Talhah, that after the verbal quarrel was over he punched (tumbuk) Kasim, that Kasim had not pushed him, that after he punched Kasim he took the knife from the van, that he then flashed the knife at Kasim who was unarmed, that thereafter he repeatedly stabbed Kasim, that Shekar armed himself with a bottle after Shekar witnessed Kasim being stabbed, that Shekar attempted to protect Kasim, that he (accused) seeing Shekar with a bottle then repeatedly stabbed Shekar with the knife, that Shekar had not run away but felled where he was stabbed, that Shekar felled in a pool of blood, that Shekar had not attacked nor hit him (accused) when Shekar was stabbed, that Kasim and or Shekar had not pursued him with bottles in their hands, that Kasim and Shekar only attempted to wrestle away the knife from him, that there was no such struggle or tussle with the parties rolling on the ground, that Shekar and or Kasim had not threatened his life, that he held the knife with the intention not to protect himself, that his testimony was not true, and or that the defence of private defence was an invention.

At that juncture of her searching examination, the learned DPP made the first of what would be 2 successive applications by her to impeach the credit of the accused. In her first application, the learned DPP contended that the testimony of the accused was inconsistent with his former statements in his caution statement (D24), on account of the following differences:

(a) the accused testified that he walked over to Kasim to stop Shekar, Kasim and SP10 from drinking at that place, but had stated in D24 "dia pergi ke tempat untuk melarang mereka buat perkara kotor di tempat bilik suci";

(b) the accused testified that he wanted to stop Shekar, Kasim and SP10 from drinking at that place, but had stated in D24 "dia hendak melarang aktiviti pelacur";

(c) the accused testified that Shekar, Kasim and SP10 were in front of the surau, but had stated in D24 that all three were at the back of Restoran Banafe;

(d) the accused failed so to testify, but had stated in D24 that he ran inside Restoran Banafe; and,

(e) the accused testified that the knife was taken from the sink, but had stated in D24 that the knife was taken from the kitchen.

If a witness has given one version of the incident to the police and then gives a different version to the court and it becomes a question whether his evidence can be relied on, the procedure to deal with that question is that laid down by Taylor J in *Muthusamy v. PP* [1948] 14 MLJ 57, 59, and which is as follows:

> The proper way to apply the sections is this. On the request of either side, the Court reads the former statement. If there is no serious discrepancy the Court so rules and no time is wasted .. .
>
> Differences may be divided into four classes:
>
> (a) Minor differences, not amounting to discrepancies;
>
> (b) Apparent discrepancies;
>
> (c) Serious discrepancies;
>
> (d) Material discrepancies.
>
> ...
>
> If the police statement gives an outline of substantially the same story there being no apparently irreconcilable conflict between the two on any point material to the issue, the Magistrate should say so at once "The difference is not such as to affect his credit" and hand the statement back.

> If, however, the difference is so material as probably to amount to a discrepancy affecting the credit of the witness, the Court may permit the witness to be asked whether he made the alleged statement. If he denies having made it, then either the matter must be dropped or the document must be formally proved, by calling the writer or, If he is not available, by proving in some other way that the witness did make the statement.
>
> If the witness admits making the former statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him, preferably by the Court, and he must have a fair and full opportunity to explain the difference. If he can, then his credit is saved, thought there may still be doubt as to the accuracy of his memory. This procedure is cumbersome and slow and therefore should not be used unless the apparent discrepancy is material to the issue.

Only in the case of a serious or material difference, is it sufficient to invoke the operation of s. 153 of the Evidence Act 1950 (see *Lim Young Sen v. PP* [1994] 2 SLR 257).

There were undeniable differences between the evidence and caution statement of the accused. But the testimony of the accused that he walked over to Kasim to stop Shekar, Kasim and SP10 from drinking at that place generally accorded with his former statements "dia pergi ke tempat untuk melarang mereka buat perkara kotor di tempat bilik suci ... dia hendak melarang aktiviti pelacur", for both said that the accused walked over to Kasim to restrain an unwanted activity. The testimony of the accused that Shekar, Kasim and SP10 were in front of the surau generally concurred with his former statement that all three were at the back of Restoran Banafe, for both said that Shekar, Kasim and SP10 were seated in the same general area, as the surau was adjacent to the back of Restoran Banafe. The testimony of the accused that the knife was taken from the sink generally agreed with his former statement that the knife was taken from the kitchen, for both said that the knife was taken from the same general area, as the sink and kitchen were both located at the rear portion of Restoran Banafe. Hence, the story was substantially the same except for the details. As for the omission of the accused to testify that he ran inside Restoran Banafe, "a mere omission is, hardly ever a discrepancy" (see *Muthusamy v PP [supra]* at 59). There was no serious discrepancy between the testimony and caution statement of the accused on the points in issue.

Thereupon such ruling, the learned DPP immediately made her 2nd application to impeach the credit of the accused, on account of the differences between the testimony and former statements of the accused in his police report dated

6 May 2000. And in the case of that 2nd application, the irreconcilable conflict between the testimony and former statements of the accused in his police report was very apparent, on the following points:

(a) the accused testified that he walked over to Kasim but had stated in 1D25 "datang dua orang India yang tidak dikenali minta duit dari saya"; and,

(b) the accused testified that he walked over to Kasim to stop Shekar, Kasim and SP10 from drinking at that place, but had stated in 1D25 "datang dua orang India yang tidak dikenali minta wang dari saya dan mahu cederakan saya dengan parang dan botol yang ada pada mereka".

The version in court that the accused walked over to Kasim who was then standing near the seated Shekar, could not be reconciled with the version given to the police that Kasim and Shekar "datang ... minta duit", for if it was the accused who walked over to Kasim, then it could not be "datang dua orang", and *vice versa*. Likewise the version in court that he walked over to Kasim to stop Shekar, Kasim and SP10 from drinking at that place could not be reconciled with the version given to the police "datang dua orang India yang tidak dikenali minta wang dari saya dan mahu cederakan saya dengan parang dan botol yang ada pada mereka", for if it was the accused who walked over to Kasim to stop Shekar, Kasim and SP10 from drinking at that place, then it could not be "datang dua orang India yang tidak dikenali minta wang dari saya dan mahu cederakan saya dengan parang dan botol yang ada pada mereka", and *vice versa*. There was a different story in the police report. The differences went to the question as to how the altercation came about, and were so material as probably to amount to a discrepancy affecting the credit of the accused.

When asked, the accused admitted that he lodged that report dated 6 May 2000, but flatly denied that he signed that police report. Thereupon, the learned DPP proceeded, without objection from the defence, to formally prove that police report, by first calling Corporal Rohani bte Kasim (EW1), who testified that the police report dated 6 May 2000 was lodged by the accused who signed that report in her presence but after she read the contents to the accused and after the accused confirmed that the contents were correct. Under cross-examination, Corporal Rohani testified that the accused was in a normal and not confused state (keliru) when he lodged his police report, that she did not see that the accused was in a state of fright (keadaan ketakutan), and that she wrote the report because the accused declined to do so. In re-examination, Corporal Rohani testified that she wrote the report for the accused because the accused had asked her to do so. And at the end of that enquiry, the police report dated 6 May 2000 was marked, without any objection from the defence, as P25.

The court then explained the two conflicting versions to the accused. The accused explained from the witness stand as follows. At the material time, he was in a state of panic. "Saya tak tahu apa harus saya buat. Saya minta tolong dari abang. Saya telepon abang saya ... Saya tak tahu apa yang berlaku. Saya tak pernah mengalami masalah begini. Abang saya paksa saya buat repot. Saya tak tahu apa yang saya nak buat report. Dalam keadaan itu saya berpusing-pusing. Saya kata kepada abang saya bergaduh dengan orang dan orang itu telah masuk ke hospital. Saya minta abang apa patut dibuat, abang suruh buat repot. Lepas itu saya buat repot. Saya ikut cakap abang. Abang suruh saya buat repot seperti itu. Saya tak tahu apa saya buat dalam repot. Lepas itu dalam [caution statement] saya dapat ingat semua yang berlaku" (see p. 91 - 93 of the notes).

The learned DPP submitted that the explanation was not reasonable, and that the explanation was an afterthought, as the report was lodged when events were still fresh and as the accused in his subsequent caution statement had not rectified the version given in his police report. Mr Teh submitted that the explanation of the accused was reasonable, as the accused was in a state of panic and fright, and was advised to make that report. Applying for an immediate ruling at the end of the impeachment exercise, Mr Teh contended, "A delayed ruling will prejudice the accused".

But a court is not obliged, at the close of an impeachment exercise, to make an immediate ruling on the matter (see *Somwa*ng Phattanasaeang v. PP [1992] 1 SLR 850; *Kwang Boon Keong Peter v. PP* [1998] 2 SLR 592). Indeed, it was held by the Federal Court per Eusoffe Abdoolcader FJ, in *Dato Moktar Hasim & Anor v. PP* [1983] 2 MLJ 232, that a witness's credit "stands to be assessed as a whole together with the rest of the evidence at the appropriate stage, that is to say, at the close for the case for the prosecution or for the defence, as the case may be. No immediate order of a summary nature can or should be made ... and the right of cross-examination or re-examination according to the circumstances should not be denied as it might well be that in the exercise of such right his credit might be repaired, restored or re-established", and it was held by the Singapore Court of Appeal, in *Syed Abdul Aziz & Anor v. PP* [1993] 3 SLR 534, that *Muthusamy v. PP* does not support any proposition that the court is obliged, at the end of the impeachment exercise, to make an immediate ruling on the credit of the witness. Nonetheless, in *Syed Abdul Aziz & Anor v. PP*, the Singapore Court of Appeal accepted that "there can of course be cases where a court confronted with a materially inconsistent previous statement made by a witness is prepared at that stage to indicate that the witness is not worthy of credit", and also more or less agreed

that in such cases the court is obliged to make an immediate ruling. The case of *Yusof bin A Samad v. PP* [2000] 4 SLR 58 is further, *albeit* persuasive, authority that the court may make an immediate ruling. And it would appear that an immediate ruling serves better the ends of justice. In the first place, without an immediate ruling, both prosecution and defence would be only left in a cleft stick. And in the second place, if the ruling is made at the close of the case for the prosecution or defence, as the case may be, it would be too late for the prosecution or defence, as the case may be, to repair, restore or re-establish, even if it could, the credit of the witness at the close of the case for the prosecution or defence, when the case at that stage would have closed. On the other hand, an immediate ruling, even if impeaching the credit of the witness, would still leave a window to the prosecution or defence, as the case may be, to repair, restore or re-establish the credit of the witness. In any event, an immediate ruling on the credit of the accused would not impair the conduct of the defence, and the court in the making of an immediate ruling could only err, only on the side of the defence.

The accused explained that the reason for the different versions, was that his elder brother had pushed him to lodge the report ("Abang saya paksa saya buat repot") as per the said report ("Abang suruh saya buat repot seperti itu"). The accused revealed that before he lodged the report, he informed his elder brother that he had fought with someone ("Saya kata kepada abang saya bergaduh dengan orang dan orang itu telah masuk ke hospital"). But that would mean that the accused knowingly lodged a false report on the incident, as the report of the accused was not of any fight or quarrel. The accused explained that he was in a state of panic, that he did not know what he should do ("Saya tak tahu apa harus saya buat"), and that he lodged the said report solely on the advice of his elder brother. Nonetheless that would still mean that the accused knowingly lodged a false report. The accused explained that he was confused ("Dalam keadaan itu saya berpusing- pusing") and that he was not aware of what he was stating in his report ("Saya tak tahu apa saya buat dalam repot"). But it would not appear from the report that the accused would not have been aware of what he was stating in his report, for only one with a collected and composed mind could have given that otherwise cogent but false and exculpatory story in the report. There was no reasonable explanation for the materially inconsistent previous version. In the event, it was the ruling that there was a successful impeachment of the accused's credit under s. 155(c) of the Evidence Act 1950. "It should be stressed ... that a successful impeachment of a witness's credit ... only goes to the weight of his oral testimony in court and not to its admissibility. It does not mean that all his oral testimony will

be expunged ... [or] that all his evidence must be disregarded" (*Kwan Boon Keong Peter v. PP* at 608, per Yong Pung How CJ) , for notwithstanding the successful impeachment of a witness's credit, the court must yet carefully scrutinize the whole of the evidence to determine which aspect might be true and which should be disregarded (see *Somwang Phattanasaeang v. PP* (at first instance) at 148; see also *PP v. Mohd. Ali bin Abang & Ors* [1994] 2 MLJ 12).

Following that latter impeachment exercise, the accused resumed his testimony, still under cross-examination, as follows. He was arrested by SP11, at about 11.30 pm on 6 May 2000, that is, after he lodged his police report (P25). He could not remember whether he was physically examined by SP11. He agreed that "pada masa pemeriksaan physical itu SP11 rampas sepasang kasut dari [dia]" then worn by him. P12(9) is a photograph of that pair of shoes. When he was arrested, he was not wearing the clothing worn during the incident. That clothing (P8B & P8C) was recovered by the police from 350-1, Jalan Salleh, Muar. P12(7) is a photograph of that clothing. The police took him to Jalan Sungai Abong, Muar, whereat from a drain, the police recovered the knife "yang di gunakan semasa itu". P7B was the knife in question. "Saya akui P7B adalah pisau saya." He threw P7B into the drain and changed his clothing, before he lodged his report. He disagreed that he threw away the knife and changed his clothing to prevent the recovery of the knife and clothing by the police. He disagreed that when he was arrested he had not complained about the alleged injuries on him.

Under re-examination, the accused testified that it was Shekar, not Kasim, who held the bottle. Kasim was not armed with any weapon or bottle. When he was arrested, he complained to SP11 "tentang kecederaan yang saya alami". He was taken to the hospital but he was not treated. Behind Restoran Banafe was a kitchen. Inside Restoran Banafe, towards the rear of the building, was also a kitchen.

The defence then applied for leave to adduce evidence that the accused was taken to the hospital on 17 May 2000, which the prosecution raised no objection; leave was granted.

On re-call, the accused testified that a few days after the incident he was taken to the Muar Hospital, and that his elder brother had lodged a report that he was not taken to the hospital. Under cross-examination, the accused testified that his elder brother reported that he (accused) was beaten by the police. He agreed that the police took him to Muar Hospital for examination on 17 May 2000, and that on that day he was examined by one Dr Lim. He could not confirm that Dr Lim found no marks of injuries on him. He did not report that he was beaten by the police. He agreed that he was produced before a

magistrate on 8 May 2000, 13 May 2000, and 17 May 2000, and that on all those occasions he did not complain to the magistrate that he was beaten by the police. He agreed that on all occasions he was before the magistrate after 17 May 2000 he did not complain he was beaten by the police. He disagreed however that he did not complain to the magistrate because he was never beaten by the police. He did not know that he could complain to the magistrate that he was beaten by the police. He disagreed that the police had ho reason to beat him up. He disagreed that his story of police assault was a fabrication. Under re-examination, the accused said that he was beaten by the police, before 17 May 2000. He could not remember whether his lawyer had complained to the magistrate on his behalf.

The other witness for the defence was one Talhah bin Abdullah (DW2), who testified as follows. On 6 May 2000, he had known the accused for two years. On 6 May 2000, the accused was at work, at Restoran Banafe. Prior to 6 May 2000, on numerous occasions, he had been to Restoran Banafe. On the night of 6 May 2000, he went to Restoran Banafe, in a van driven by the accused. The accused parked the van at a place near the surau. They entered the restaurant. Inside the restaurant, he had his food and drink near the cashier counter, while the accused counted the takings at the cashier counter. The accused walked to the back of the restaurant. A few minutes later, when he was at the back portion of the restaurant to deposit his cup and plate in the wash sink, he saw two males and one female of Indian descent. He also saw the accused. One of those two males had a bottle in his hand. That person struck the accused on his stomach with the bottle. He went over to one of those two males and tried to pull him away. He said "jangan gaduh, jangan gaduh". He managed to pull one of those persons away. The accused ran to the area of the sink. Kasim struck him. Shekar threw a bottle at the accused. That bottle did not hit the accused. "Lepas itu tak nampak apa-apa ketiga jatuh. Lepas itu Shekar bangun dan berlari. Lepas itu Kasim berdarah. Perkara itu cepat berlaku - beberapa saat sahaja." He and the accused picked Kasim up. They carried Kasim to the van. They drove Kasim to the hospital. The female person fled from the scene during the initial stages of the incident. The accused took a knife from a sink. "Lepas itu semua berlaku pantas. Lepas itu saya nampak Kasim sudah berdarah." He was arrested and remanded for 14 days. The police interviewed/interrogated (soal-siasat) him. The police assaulted him. 8 members of the police assaulted him. He could identify them. He could not remember when he was released. He is now taking steriods. He reported he was beaten by the police. D26 was that report. He was assaulted on numerous occasions. He was struck on his chest with a torchlight. He was kicked. His mouth was gagged with a towel. "Ada anggota yang panggil saya babi. Anggota

kata saya anak babi. Ludah Talhah. Anggota kata emak saya Cina masuk Islam, dan sebab itu babi dan saya juga babi. Anggota police pukul tapak kaki saya. Lepas itu saya dibebas. Saya juga rasa takut sampai sekarang. Dulu saya sehat, sekarang saya sakit teruk sebab dipukul. Talhah tak dapat berkerja. Saya masuk ICU selama 4 hari. Sebab dipukul oleh polis saya dapat banyak kesan kecederaan, Saya guna wheelchair selama 3 bulan. Saya masih ada kesan di badan.".

DW2 was then invited, at that stage of his astounding testimony, by learned counsel to show his alleged injury marks to the court. Readily, DW2 pointed to numerous marks on his lower body and lower limbs, to marks that were not inconsistent with the marks of old injuries. Since there could be no better visual record of those marks shown by DW2 than a photographic record, it was ordered that photographs be taken in the presence of the court and all parties, of those marks on DW2. 8 photographs were then taken by a police photographer (Lance Corporal Sundramurthy a/l Raman), of such marks as were pointed out by DW2, with an instantmatic camera, and which 8 instantmatic photographs were marked, on the application of the defence, as D27 (1-8).

Following that "interruption", DW2 resumed his testimony as follows. "Saya makan steriod untuk menahan kesakitan. Merujuk kata doktor, kecederaan dalaman adalah spinal cord dan kidney." Prior to him being assaulted by the police, he was a fit person. He was treated at the Hospital Aminah, Johore Baru. According to Hospital Aminah who x-rayed him, "di dapati bahawa dada sebelah kiri saya tissue macam pecah akibat tumbukan torchlight". He gave 2 or 3 statements to the police. He had not given those statements voluntarily - "Saya di pukul." "Semasa saya menarik Kasim, dia orang pada masa itu minum arak dan mabuk dan agresif.".

Under cross-examination, DW2 testified as follows. He disagreed that the police had not beaten him, that the police had not uttered "babi" or words to such effect, or that only 2 persons had interrogated him. The accused saw him being beaten by 8 persons. He disagreed that SP11, Lance Corporal Razman bin Nikmat, and Lance Corporal Yahya were the only persons who had interviewed/ interrogated him, or that SP11, Lance Corporal Razman bin Nikmat, and Lance Corporal Yahya had not touched him. "Ketiga-tiga mereka ada pukul saya. Selepas dibebas, 6 atau 7 bulan kemudian, muka saya sembab, saya pergi ke hospital dan terus dimasukkam ke ICU Muar." He disagreed that his admittance to the ICU and present physical condition were not because of any police beating, that he was coughing blood even before he was arrested, or that the marks seen in D27 (1-8) only arose after 17 May 2000. He could not remember whether he was examined by Dr Sharon Castilda of the Hospital Aminah, Johore Baru on 17 May 2000. To the question "Pemeriksaan Dr Sharon tidak

dapat kecederaan seperti yang kamu telah tunjuk" he replied, "Betul, saya tidak tunjuk kecedaraan pada badan dan kaki saya". He disagreed that the police had no reason to beat him, or that his story of police beating was false. He is related to the accused who is also his good friend. He disagreed that he went to Restoran Banafe by himself. He went to the restaurant with the accused in a van. He disagreed that the quarrel between accused and Kasim had already started when he reached Restoran Banafe, or that that quarrel was witnessed by Shekar and SP10. He disagreed that he had no knowledge of the events prior to the quarrel. He agreed that the lights at the back of Restoran Banafe were lit, and that he tried to separate the accused and Kasim. He disagreed that the accused punched Kasim as he was trying to separate them, that the accused then took off from the place of quarrel and returned with a knife. He agreed that the accused held a knife, namely P7B. He disagreed that the accused took P7B from a van, that the accused pointed that knife at Kasim, injured the hand of Kasim and then stabbed Kasim several times with that knife, that Shekar upon him seeing Kasim being stabbed then took off from the place of quarrel and returned with a bottle, that Shekar only armed himself with a bottle after he saw Kasim being stabbed, that Shekar wanted to protect Kasim but was stabbed by the accused, that Shekar had not thrown the bottle, that the accused upon him seeing Shekar with a bottle then armed himself with the knife, or that Shekar felled where he was stabbed, that the pool of blood was Shekar's pool of blood. Shekar got up and ran from away the place of the incident. The accused had not stabbed Shekar. He disagreed that Kasim had not punched the accused. Kasim was drunk and aggressive, and Kasim punched the accused. Shekar also punched the accused. He disagreed that the accused had not sustained any injuries. After the incident he and the accused retrieved the knife. The accused threw the knife into a drain. He was beside the accused when he (accused) gave his report to Corporal Rohani, but he did not hear what was reported. He disagreed that SP10 had witnessed the entire incident. SP10 only witnessed the initial stages of the incident. He disagreed that his testimony is false. He could not remember whether he gave a s. 112 statement to the police, but he admitted that the signature at the bottom of D26 was his signature.

The learned DPP then applied to adduce evidence to rebut the allegation of police beating. Leave was granted. Thereupon, the learned DPP applied, and the defence agreed thereto, to suspend further cross-examination of DW2.

The first rebuttal witness summoned by the prosecution was one Mohd Nasir Alwi (PW12), an Assistant Records Officer at the Pejabat Rekod Perubatan Hospital Muar, that records of all patients admitted to the Muar Hospital, including those admitted to the ICU, are maintained by the Pejabat Rekod Perubatan Hospital Muar. There is a record of one Talhah bin Abdullah k/p 30022406 or k/p 750318-01-6807 at the Pejabat Rekod Perubatan Hospital

Muar, According to that record, Talhah bin Abdullah was treated in 2001, between 14 February 2001 - 2 March 2001, but was never admitted to the ICU. Under cross-examination, PW12 testified that DW2 was warded in the hospital on 14 February 2001 - 2. March 2001, and treated at the dialysis unit on 17 April 2001, 14 May 2001 and on 6 August 2001. Under re-examination, SP12 said that DW2 was not warded on 17 April 2001, 14 May 2001, or on 6 August 2001.

The next rebuttal witness was SP11, who testified as follows, DW2 was arrested at about 11.30 pm on 6 May 2000, to assist in the investigation. DW2 was released at 9am on 16 May 2000. Only 3 police personnel, Lance Corporal Razman bin Nikmat, Lance Corporal Yahya and himself, had interviewed/ interrogated DW2 during the entire duration of DW2's remand. None had beaten or kicked DW2. He had not used a torchlight to assault DW2.

Under cross-examination, SP11 agreed that DW2 was initially arrested as a suspect. SP11 further testified that he did not know and had not seen DW2 being assaulted by the police. He had not threatened DW2 when DW2 gave his statement. He disagreed that he had reminded DW2 that he was assaulted by the police. In May 2001, he was informed that DW2 had lodged a report of assault by the police. He denied that more than 3 police personnel had access to DW2. He denied that DW2 had given his statement under threat, or that he was covering up for his men. Under re-examination, SP11 again affirmed that he had not threatened DW2.

Lance Corporal Razman bin Nakmat (PW13) testified that in May 2000, he was instructed by SP11 to interview/interrogate DW2. Only 3 persons, namely SP11 and Lance Corporal Yahya and himself, had access to DW2. He had not kicked, slapped, or assaulted DW2. He had not used any instrument on DW2. No other police personnel had access to DW2. No police personnel had kicked, slapped, or assaulted DW2. He had not abused DW2 with words such as "babi". Under cross-examination, SP13 testified that he understood that DW2 was a suspect. He denied that Lance Corporal Yahya had assaulted DW2, that he saw Lance Corporal Yahya assaulting DW2 with a torchlight, that he and Lance Corporal Yahya had beaten the bottom of DW2's feet with a cable, that he and Lance Corporal Yahya had kicked DW2, or that he and or others had covered the eyes of DW2 with a piece of cloth. Under re-examination, SP13 said that he had not applied any force on DW2.

Lance Corporal Yahya bin Othman (SP14) testified that only 3 persons interviewed/interrogated DW2, and they were SP11, SP12 and himself. He had not kicked or hit DW2, with his hands or with an instrument. He had not seen

DW2 covered with a cloth. He had not sworn at DW2 with words such as "babi". Under cross-examination SP14 testified that DW2 was interviewed/ interrogated about 2 or 3 times. He denied that he had threatened or assaulted DW2. He denied that he had cursed DW2 with words such as "babi". He denied that he had covered the month and nose of DW2 with a cloth tied at the back of the head of DW2. Under re-examination, SP14 said that no force was applied on DW2.

Chief Inspector Mohd. Rashid Tanin bin Abdullah (SP15) testified that he investigated both Muar Reports 3336/2000 and 3339/200 but found that those reports of assault by the police were false. Under cross-examination, SP15 said that he interviewed other remanded persons, one Dr Sharon Casilda and one Dr Lim Kim Meng, and that he checked the lockup and station diaries. Under re-examination, SP15 said that Dr Sharon examined DW2 on 17 May 2000 at the Hospital Aminah, Johore Batu, while Dr Lim examined DW2 on 17 May 2000 at the Muar Hospital.

Dr Sharon Casilda Theophllus (SP16), a government doctor, testified that at 3.14 pm on 17 May 2000, at the Hospital Aminah, Johore Baru, she attended to DW2. DW2 was thinner than a normal person. DW2's vital signs were stable and his lungs were clear and working in full capacity. DW2's cardio-vascular system showed no abnormality. DW2's abdomen was normal. There was no fracture to the rib or rib cage. DW2 had slight bluish bruises on his chest. Those bruises were about 1 to 2 weeks old, but fading. A fall could have cause those bruises. She did not see those injuries in D27 (1-8). There were no such injuries as in D27 (1-8). Her diagnosis was assault with bruises over the chest, as DW2 had informed her that he (DW2) was beaten by the police. DW2 said that he was beaten on his chest, that he had fever for the last 3 days, and that he was coughing, with blood in his sputum, the day before. She did not detect any blood in DW2's sputum. DW2 who was not warded, was given medication. In January 2002, she gave DW2's medical report dated 23 August 2001 to SP15.

The learned DPP then requested that the marks of alleged injuries on DW2 be examined by SP16 in the presence of the court. Then having examined those marks of alleged injuries on DW2, SP16 testified that the marks on DW2 are marks of a medical condition. The depressions [D27 (6-8)] on the left shin of DW2 are called pitting oedema, a medical condition caused by water retention In the blood which causes the leg to swell. That could be due to a heart or kidney problem, or even on account of pregnancy. The reason for those depressions on the left shin of DW2 was because the soft tissue was filled with water and when depressed would take time to take normal shape. The

long linear lines on the thighs of DW2 [see D27 (1-5)J could be seen in pregnant women and in patients with prolonged use of steroids. It is actually the condition of the skin being stretched. SP16, said that all marks on DW2 were not caused by injuries.

Under cross-examination, SP16 said that the bruises on the chest of DW2 were not inconsistent with his complaint of assault. DW2 did not complain of any difficulty in his breathing. She did not examine DW2's internal organs, but she found nothing wrong with DW2's abdomen which includes his kidneys, liver, spleen, bladder and intestines. She did examine DW2 below the knee but did not see the pitting oedema. She did not check the rib section.

Under re-examination, SP16 said that DW2 did not complain about the other parts of his body, that the physic of DW2 is about the same as that in May 2000, and that she did not investigate the internal organs as there was no complaint from DW2 and as she had not detected any abnormality calling for such investigation.

The next rebuttal witness, also a government doctor, one Dr Lim Chee Keong (SP17), testified that on 14 July 2001 at the Muar Hospital, he attended to DW2. DW2 was warded on 14 July 2000 to 2 March 2001. There is no record that DW2 was warded at the Muar Hospital before 14 July 2001. Whilst DW2 was warded, he examined DW2 on an almost daily basis. Tests were conducted on DW2. DW2 was warded on the referral of Dr Sheik Ibrahim Salleh. Dr Sheik had diagnosed the condition as nephrotic syndrome, a condition in which the patient loses protein in his/her urea, as a result of specific diseases to the kidney. DW2 was admitted on that diagnosis. Tests conducted confirmed the diagnosis of Dr Sheik. Nephrotic syndrome could not develop from a physical injury or trauma. Throughout the period that DW2 was warded, he did not detect any signs of physical trauma on DW2. The linear lines seen in D27 (2-5) are called striae, a skin complication caused by carbonic ingestion of a steriod called "prednisolone" which is used to treat nephrotic syndrome.

Again the learned DPP requested that the marks of alleged injuries on DW2 be examined, only that time by SP17 in the presence of the court. Then having examined those marks of alleged injuries on DW2, SP17 testified that those marks seen in D27 (2-5) are "striae", that the marks seen in D27 (6-8) are pitting oedema, a condition due to low serum albumin which is a major component of blood protein. Pitting oedema is connected to nephrotic syndrome, and that the marks on DW2 could not have been caused by any physical injury or trauma. Under cross-examination, SP17 said that he was sure that DW2 had not complained to him that he had been assaulted by the police. SP17 was not re-examined.

The last rebuttal witness was one Dr Sheik Ibrahim bin Salleh (SP18), a private medical practitioner, who testified that DW2 was his patient since 1997. On 14 February 2001, DW2 complained to him that his legs were swollen. He carried out a general examination. He found that the legs of DW2 were swollen as a result of oedema, "iaitu kelebihan air dibahagian kaki". "Saya tidak dapati apa-apa kesan physical atau trauma. Pada 14 February 2001, saya ada lihat kesan-kesan oedema seperti di dalam D27 (6 & 8). Saya dapati ia pitting oedema sebab saya tekan dan kulit jadi satu pit yang dalam. Pada 14 February 2001, saya ada lihat pitting oedema tetapi bukan pitting oedema yang sama di D27 (6 & 8). Nephrotic syndrome bukan akhibat physical injury atau trauma." DW2's urine was tested. His diagnosis was nephrotic syndrome. He advised DW2 to seek treatment at the Muar Hospital.

And once again the learned DPP requested that the marks of the alleged injuries on DW2 be examined, by SP18 in the presence of the court. Then having examined those marks of the alleged injuries on DW2, SP18 testified that the marks as in D27 (2-5) are "kesan-kesan striae", that "striae ialah kesan pada bahagian kulit dijadi apabila kulit di bengkak disebabkan oleh oedema atau oleh sebab-sebab lain seperti steroid, contoh prednisolone", that D27(6-8) is pitting oedema, and that striae and pitting oedema could not be caused by physical injury or trauma. SP18 further testified that he prescribed prednisolone to DW2, when he attended to DW2 on 26 November 2001, 12 February 2002, 10 March 2002, 8 June 2002, 7 July 2002 and 3 August 2002. Under cross-examination, SP18 testified that the last occasion he examined DW2 before 14 February 2002 was on 31 July 2000. On 31 July 2000, DW2 complained that he was beaten on his fight ribs by the police and that he felt pain in that part of his body. Physical injury could cause injury to the kidneys. But an injury to the kidney, even if left untreated, could not cause nephrotic syndrome. Under re-examination, SP18 said that on 31 July 2000, "saya tidak lihat kesan trauma. Talhah kata sakit bila saya tekan rusuk kanan. Saya tidak buat x-ray atas rusuk kanan. Di rekod saya tidak ada catatan pada 14 February 2001 bahawa Talhah ada complain dia dipukul oleh polis. Saya tidak ingat samada Talhah ada complain pada 14 February 2001.

Following the testimony of those rebuttal witnesses, DW2 resumed his testimony, still under cross-examination, as follows. He denied that his testimony was not true and or was fabricated to help the accused.

On 16 May 2000, he gave a s. 112 statement to SP11, but not all statements were his. Then on a photostat of ID28, DW2 marked out what he said were not his statements (see P28A which was admitted only to identify and settle the disputed portion but not as any evidence of the facts asserted therein). Thereupon, the learned DPP gave notice that she would be applying to impeach the credit of DW2.

The learned DPP contended that the version of DW2 in court, namely that Shekar struck the accused on his stomach with a bottle, that Kasim hit (pukul) the accused, that the accused did not stab Shekar, that after DW2 separated Kasim and the accused, the accused ran to the sink, pursued by Kasim and Shekar, that Shekar threw a bottle at the accused, that all three felled to the ground, and that "Kasim berdarah manakala simati berlari dari tempat itu", was materially different from the version given by DW2 in his statement to the police, namely "apabila dia leraikan, OKT lari kedalam kedai dan kemudian datang semula dengan bawa pisau, dalam masa itu juga seorang India pergi ke lorong gelap dan datang semula dengan membawa botol, masa itu Rifkee telah tikam seorang lelaki India, kemudian lelaki yang berada botol hendak menyerang Rifkee dan Rifkee pun tikam lagi lelaki India tersebut".

Mr Teh submitted that DW2's s. 112 statement must first be proved before the court could rule on the existence or non-existence of any material differences. But the procedure is, that the court reads the former statement and then rules, affirmatively or otherwise, on the alleged material discrepancy. If the court finds that there is no serious or material discrepancy, the impeachment exercise will there and then end. Only if the court finds that the difference is so material as probably to amount to a discrepancy affecting the credit of the witness will the witness be asked whether he made the former statement, and then only if the witness denies having made it will the impeaching party be required to prove the former statement of the witness (see *Muthusamy v. PP [supra]* at 59). Proof of the former statement comes after a ruling that there is a serious or material discrepancy. That ruling comes before proof of the former statement. Yet given so, the learned DPP applied to suspend all further cross-examination of DW2, and in its stead to proceed, without a ruling that there is a serious or material discrepancy, to prove the former statement of DW2. The cart was put before the horse. But the order was no longer of consequence in the instant case. Already the court had perused the former statement (P28A), and already DW2 had denied that the disputed portion was his statement. Moreover, already it was that clear that the version in court of DW2 could not be reconciled with the version of DW2 in his former statement (if it was his former statement), on the following points:

(a) DW2 testified that he and the accused went together in van to Restoran Banafe, but had stated in P28A that he went alone to Restoran Banafe;

(b) DW2 testified that after he and the accused reached Restoran Banafe, he had his food beside the cashier counter while the accused counted the takings at the cashier counter, and that thereafter the accused proceeded to the back of the restaurant, but had stated in P28A that when he reached Restoran Banafe he saw the accused and Kasim quarreling;

(c) DW2 testified that the accused had not stabbed the deceased, but had stated in P28A "masa itu Rifkee telah tikam seorang lelaki India, kemudian lelaki yang berada botol hendak menyerang Rifkee dan Rifkee pun tikam lagi lelaki India tersebut".

It therefore transpired that in any event it was at the stage where the former statement must be proved. On that score, the application of the prosecution was granted. The first witness summoned by the prosecution to prove the former statement of DW2 was SP11, a familiar face, who testified that at about 11am on 16 May 2000, he recorded DW2's statement (ID28). He was the only person with DW2, when DW2 gave his statement. First he recorded the personal particulars of DW2. He communicated with DW2 in Bahasa Malaysia. Before he recorded the statement, he read the provisions of s. 112 to DW2. He explained to DW2 that he must answer all questions but may withhold any answer that may incriminate him. He informed DW2 that he must speak the truth. He was satisfied that DW2 fully understood the provisions of s. 112. Thereafter, he requested DW2 to put his signature onto 1D28. He then put his questions DW2. DW2 answered his questions. He used a typewriter to record the answers. "Saya soal, rakam soalan, lepas itu DW2 jawab dan saya taip jawapan. Itu lah cara yang saya guna keseluruh percakapan." He read back the statement recorded to DW2. DW2 confirmed that ID28 was accurate. He asked DW2 whether he had any changes. DW2 had none. He asked DW2 to put his signature onto each page of ID28. He also signed on each page of ID28. ID28 was the statement recorded from DW2. The signature on the right side of each page of ID28 was his signature, while the signature on the left side of each page of ID28 was DW2's signature. All statements in ID28 came from DW2. He had not added anything. He had not forced DW2 to give the statement. When ID28 was read back to him, DW2 did not dispute the statements in ID28.

Under cross-examination, SP11 agreed that he was already appraised of the facts when he recorded ID28 on 16 May 2000. But on 16 May 2000, he did not know all personal particulars of DW2. Before he recorded ID28, he only knew the name and identity card number of DW2 and the name of DW2's father. He did not know the address of DW2. He had interviewed/interrogated DW2 before 16.5.2000. He could not remember whether he had asked DW2 about his occupation. He disagreed that he did not ask for DW2's personal particulars from DW2 but typed the personal particulars of DW2 without him having asked for the same from DW2. ID28 was recorded after DW2 was released. After DW2 was released, he brought DW2 to the police station to record his statement. He had no knowledge that DW2 was in pain or had bruises on his chest at the material time. He disagreed that he was lying. He denied that he had threatened DW2 when he recorded ID28. He denied that he

had asked DW2 to co-operate. He disagreed that he had said to DW2 that he too would be charged if he did not cooperate. He denied that he had reminded DW2 that whilst he was remanded he was assaulted. He denied that he had not read but merely stamped the provisions of s. 112 on ID28. He disagreed that the disputed portion of ID28 were his statements.

Under re-examination, SP11 said that ID28 was based on the statements of DW2. He had not interposed his own knowledge. He did not see any injury on DW2. DW2 did not complain of any injury. Other than his questions, all statements in ID28 were the statements of DW2.

SP11 was the only witness called by the prosecution to prove the former statement of DW2. Both learned DPP and counsel then applied for the ruling of the court.

The learned DPP submitted that the prosecution had proved the former statement of DW2, in accordance with the procedure as stated in *Muthusamy v PP*. *Ahmad Din & Ors v. PP* [1962] MLJ 94, and *Krishnan & Anor v. PP* [1981] 2 MLJ 121. The evidence of a police witness, where it is not inherently improbable, must in the first instance be accepted (*PP v. Mohamed Ali* [1962] MLJ 257 was cited). Alleged assault had been rebutted. The prosecution had proved that DW2 was a liar.

Mr Teh submitted that the onus was on the prosecution to prove that the former statement was voluntarily made by DW2 and on a standard of proof of beyond reasonable doubt. On 17 May 2000, DW2 reported that he had been forced to give a statement. On 17 May 2000, DW2 was treated by SP16 who found bruises on DW2. SP16 confirmed that the bruises were about 1 to 2 weeks old, and that DW2 had complained to her, on 31 July 2000, that he was assaulted by the police. The alleged injuries had been rebutted, but it did not follow that the entire testimony of DW2 had not been discredited. The bruises were corroborated by SP16 who examined DW2 on 17 May 2000. A s. 112 statement must be voluntary if it is to be used to contradict the witness (*Norliana v. PP* [2001] 1 CLJ 36 was cited). It would not be unreasonable to deduce that SP11 who was the investigation officer could have interposed his personal knowledge onto DW2's statement.

The learned DPP replied that it was held by the Court of Appeal, in *Yusof bin Omar v. PP* [2001] 3 CLJ 122, that it is not necessary for the prosecution to prove voluntariness before the s. 112 statement can be accepted as evidence, but Mr Teh answered that Yusof bin Omar was decided on different facts.

There is not much on the subject, but what authorities there are only say that a former statement of a witness is to be proved "by the evidence of the officer who examined the accused and reduced the statement to writing, or by

the interpreter, or by some other means" (*Kurup v. PP* [1934] MLJ 17 per Terrell J), "by calling the writer, or, if he is not available, by proving in some other way that the witness did make the statement" (*Muthusamy v. PP*), "by making the person who recorded [the statement] available for cross-examination" (*Ahmad Din & Ors @* 95 per Hepworth J.), "by putting into the witness box the person, to whom the relevant statement was made or by whom it was recorded" (*Krishnan & Anor v. PP @* 124 per Salleh Abas FJ., as he then was). That was done in the instant case. No question about it, the prosecution had followed procedure.

And there should be no question about it that the prosecution had not to prove voluntariness before ID28 could be accepted in evidence to impeach the credit of DW2, as the argument that for a s. 112 statement to be used to challenge the credibility of a witness his voluntariness must first be proved, was comprehensively rejected by the Court of Appeal in *Yusof bin Omar v. PP*, where Abdul Hamid Mohamad JCA. said as follows:

> Menghujahkan bahawa untuk kenyataan di bawah s. 112 KAJ digunakan untuk mencabar kebolehpercayaan seseorang saksi atau menuduhnya di bawah s. 193 Kanun tersebut mestilah dibuktikan kesukarelaan terlebih dahulu, bererti memakai syarat-syarat dalam s. 113 KAJ kepada kenyataan di bawah s. 112 KAJ. Pada pandangan kami, ini tidak wajar ...

A parallel view was expressed across the causeway, in *Sim Bok Huat Royston v. PP* [2001] 2 SLR 348, where it was held by Yong Pung How CJ. that all that is required for a witness' previous inconsistent statement to be admitted to impeach the credit of the witness is for it to be proved that the statement was made by the witness, but that it is not required to prove that it was made voluntarily.

The prosecution had only to prove that ID28 was made by DW2. The prosecution had proved that; ID28 was then admitted as P28. The court then explained to DW2 the differences between his versions in court and in P28, on the points already set out hereinbefore.

The explanation of DW2 was extremely short. He said he was pressured and threatened by SP11. SP11 said that unless he signed on all pages he would alsobe charged together with the accused under s. 302. SP11 said that he (SP11) would prepare the statement, and that he (DW2) only had to sign the statement. "Dia ada pukul saya semasa saya di dalam soal-siasat sebelum ambil statement. Dia ingatkan saya jika saya tak kerjasama dia akan pukul saya, masukan juga ke penjara Simpang Renggam. Saya tidak memberi 112 statement dengan sukarela, dan sebab itu ada perbezaan."

Mr Teh submitted that the explanation of DW2 was reasonable and capable of being believed. The gist of the explanation was that P28 was not made voluntarily. "Hence the contradiction." On 17 May 2000, DW2 reported that he was assaulted by the police and that he was forced to give a statement. One of his allegations was that he was assaulted on his chest, with a torchlight. That allegation was supported by SP16 who said that there were bruises on the chest of DW2 who told her that he was assaulted by the police. SP18 also testified that DW2 told him that he was assaulted by the police. The marks on DW2 might have been rebutted, but the rest of his explanation was intact.

The learned DPP submitted that the explanation was not reasonable and could not be accepted. "Jika pukul teruk, ia akan di lihat oleh SP16 pada 17 May 2000." "SP18 tidak lihat apa-apa trauma atas badan DW2 [pada 30 July 2000]." "DW2 cuma datang membohong mahkamah." "DW2 exploited his medical condition to prove his allegation." P28 was recorded after DW2 was released. But already by then the police had 2 eye witnesses (Kasim passed away on 9 April 2001 - see P23) as well as the exhibits. There was no plausible reason for the police to force DW2 to give a statement. The explanation could not be accepted "[sebab ia] ada berkait dengan perkara yang jelas bohong".

DW2 said in his explanation, that he was pummeled and battered by the police into giving the statements in the disputed portion, into giving what were not his statements. And if the disputed portion was given under such circumstances, then there was a perfectly reasonable explanation for the discrepancies between the 2 conflicting versions. DW2 alleged that the marks on his body were the vestiges of the injuries inflicted by the police - "Dulu saya sehat, sekarang saya sakit teruk sebab dipukul. Talhah tak dapat berkerja. Saya masuk ICU selama 4 hari. Sebab dipukul oleh polis saya dapat banyak kesan kecederaan. Saya guna wheelchair selama 3 bulan. Saya masih ada kesan di badan." But DW2's allegation was totally shattered by 3 medical doctors who as a matter of factly testified that those marks were "striae and pitting oedema" and that those marks had nothing to do with any physical trauma or injury. And DW2 could not have not known of his own medical condition when he first took the witness stand on 11 June 2002, as his medical condition - nehprotic syndrome - was dignosed by SP18 as far back as 14 July 2001 and by the Muar Hospital between 14 July 2001 to 2 March 2001. Further, DW2 was given medication by SP18 to treat his nephrotic syndrome on 26 November 2001, 12 February 2002, 10 March 2002, 8 June 2002, 7 July 2002 and on 3 August 2002. DW2 must have known that the marks on his body had nothing to do with any physical trauma or injury inflicted by the police. Yet surely knowing it was

not true, DW2 falsely alleged that the marks on his body were the vestiges of the injuries inflicted by the police. It was certainly not off the mark to say that DW2 had exploited the marks on his body to sustain his false charge.

It was submitted that bruises were seen by SP16 on 17 May 2000. It was submitted that those bruises, said to have been 1 to 2 weeks old, were consistent with assault by the police. But DW2 himself testified that on 6 May 2000 he was "pukul" by Kasim. Hence those slight bluish bruises seen on 17 May 2000 could have been caused at the time of the incident. And as said by SP16, it could also have been caused by a fall. It was submitted that both SP16 and SP18 confirmed that DW2 told them that he was assaulted by the police. But that only proved that DW2 had informed others that he was assaulted, but not that he was assaulted by the police. Fairly said, there was not an iota of proof supporting or tending to support the allegation of DW2. Indeed, every allegation of DW2, where it could be rebutted, was rebutted. He said he was warded in the ICU for four days. But SP12 and SP17 testified that there is no record of DW2 being warded. There was no reasonable explanation. There was only a bare assertion, of a witness who was shown out to be a chronic liar in court, of a witness who could not be said merely contradicted himself or told lies on one or two points (see *Che Omar bin Mohd Akhir v. PP* [1999] 2 CLJ 780) but could have perverted the truth if not for testimony of the doctors. In the event, it was the ruling that there was a successful impeachment of DW2's credit under s. 155(c) of the Evidence Act 1950, on the points in issue. Earlier, Mr Teh informed the court that the defence would close its case after the court's ruling on the credit of DW2. And true enough, upon the latter ruling, Mr Teh promptly closed the defence, without DW2 being further cross-examined or re-examined.

The opening remark of Mr Teh, in his final submission was that the defence was one of private defence, and that it had been proved by the defence, on a balance of probabilities. Where there is evidence supporting private defence, the burden of proof is discharged if there is a reasonable doubt as to the existence or non-existence of the circumstances bringing the case within private defence. Section 102 of the Penal Code provides that the right of private defence commences as soon as reasonable apprehension of danger to the body arises from any attempt or threat to commit the offence, and it continues as long as such apprehension of danger to the body continues. It is not necessary for the accused to find himself afflicted with serious injury before the right of private defence is justified (counsel referred to *Ya bin Daud v. PP* [1996] 2 CLJ 540). Only a part of the accused's testimony was impeached. The accused testified that he was attacked first. He was kicked and punched. The accused felled. SP10 confirmed that Shekar was aggressive. SP7 confirmed that Shekar had a

high level of alcohol. Kasim and Shekar attacked the accused. The accused ran to the back of the restaurant, to near the sink. The accused was pursued. The accused grabbed the knife. Saying "jangan dekat, jangan dekat", the accused waved the knife at his attackers. Shekar attempted to take the knife from the accused. There was a struggle between Shekar and the accused for the knife. The back of the accused was against the wall. All three felled. The next thing was that Kasim was lying down in a pool of blood. The accused testified that he formed the impression that his life was in danger. The accused had the right to defend himself. The accused was not caught by s. 99 of the Penal Code. SP10 was inconsistent in her testimony. First she testified that the accused stabbed Shekar and then Kasim, but later she testified that the accused stabbed Kasim first. SP10 testified that she showed the place of the incident to the police, but no such evidence was adduced from the police to confirm that part of SP10's story. Under examination-in-chief, SP10 testified that "pergaduhan bermula bertumbuk-tumbuk, but under cross-examination, SP10 testified that both deceased and Kasim was "tumbuk" by the accused. The quality of SP10's testimony is suspect. This is a fit and proper case to acquit the accused.

The learned DPP submitted that the accused had failed to prove private defence, and or to cast a reasonable doubt to the case he was ordered to answer. It is for an accused to prove private defence. "Tidak ada sebarang keterangan tentang private defence. Versi OKT tidak di cadangkan pada peringkat kes pendakwaan tentang (i) chased by Kasim and Shekar (ii) Shekar attempted to take the knife from the accused, (iii) berguling, (iv) ketiga berjatuh, (v) botol dibaring, (vi) ambil pisau dari sinki (vii) waved the knife at Shekar and Kasim. The Federal Court held, in *Wong Swee Chin v. PP* [1981] 1 MLJ 212, that failure to cross-examine the witness on the defence will amount to an acceptance of the witness's testimony. The Federal Court held, in *PP v. Lin Lian Chen* [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285, that notice of the defence must be given. SP10 was a truthful witness. SP10 called for the police who confirmed that the caller said that 2 persons had been stabbed. Therefore. SP10 must have witnessed the entire incident. SP10 was not inconsistent. SP10 never said that Shekar or Kasim "tumbuk" the accused. SP10 was at the scene. The accused confirmed that SP10 was at the scene. Whether Kasim or Shekar was stabbed first was only a minor detail. A perfectly truthful witness may forget a detail. There is no reason to disbelieve SP10. "Keterangan SP10 di sokong oleh kecederaan Shekar dan Kasim." Both defence witnesses were impeached. "Maka, keterangan menikam perut di abaikan sepenuhnya." The accused and DW2 were not truthful witnesses. Mahkamah tidak harus menerima versi OKT. Ada kah keterangan OKT credible? The accused threw away the knife and changed his clothing to distance himself from guilt. Then having thrown away the knife and changed into fresh clothing, the accused lodged his report (D25). That was not the conduct of a person in a state of panic. The accused had more

than enough time to fabricate his testimony. The defence was an afterthought. The accused testified that he was assaulted by Shekar and Kasim and that the injuries on him were visible. The accused agreed that SP11 had examined him when he was arrested. But SP11 testified that he saw no injuries on the accused, and that evidence of SP11 was not challenged. It was only put that the accused had complained that he was assaulted, but not that the injuries on the accused were visible. DW2's evidence, for what remained of it, could not be accepted. If the accused was seriously assaulted, why had he not sought medical treatment? The defence put its case that the accused came with 2 others, but the accused testified that he only came with DW2. The defence was inconsistent, whereas SP10 was consistent. The accused, if under genuine threat, could not have had the time to observe SP10 leaving the scene. The defence was incredible. If there was such a fight, how could it be that the workers had not come out to help? The accused said that there was a loud commotion. Then why were the workers of the restaurant not alerted? The absence of injuries refuted private defence. SP10's version was more credible. The accused gave the incredible version that Shekar who had a deep stab wound had picked himself up and ran away from the scene. If it were Kasim and Shekar who attacked the accused, why should SP10 call for the police? It should be the other way round. It was Shekar and Kasim who were attacked. There was no inconsistency in SP10's testimony. The accused started the fight. He had disentangled himself, but then went to the car to take the knife. He came back with a knife. There was no danger faced by the accused. There was no reasonable apprehension of death. He was at the back of the restaurant of his family. The workers of the restaurant and Talhah were all there. Kasim and Shekar were not armed. Only the accused was armed. The accused could not have acted in self defence. Shekar only secured a bottle after Kasim was stabbed. The force used by the accused was not reasonable in the circumstances. The accused had exceeded his right. On the balance of probabilities, the accused had not proved private defence.

Mr Teh replied that notice of the defence had been given. SP10 was challenged throughout. D24 was produced through SP11 as notice of the defence. It was the defence that SP10 left the scene before the stabbing incident. Therefore, the defence could not put its case to SP10 who the defence contended was not present during the actual stabbing incident. SP11 was challenged on the injuries present on the accused. Private defence was stated right from the beginning, ie from D25 to the caution statement (D24) and then in court. It could also be inferred that the accused threw away the knife in a state of panic and not because of guilt. The defence was not fabricated. The defence should not be criticized. Why workers had not come out was not investigated by the police. A person with a deep stab wound could

still run away. Nothing incredible in the story that Shekar had picked himself up. Private defence could be maintained by an accused even in the absence of injuries to himself (counsel referred to *PP v. Ngoi Ming Sean* [1982] 1 MLJ 24, 26, and *Ya bin Daud v. PP*) .

The learned DPP replied that the defence, even with the production of D24, must put forward its case through cross-examination of the prosecution witnesses. Notice of the defence must be put to the witnesses. Defence must give notice of the facts that would be relied on.

A number of statements of the law were proffered by both learned DPP and counsel. But it is correct that "there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony" (*Wong Swee Chin v. PP* @ 213 per Raja Azlan Shah CJ, as HRH then was). Further, in the cross-examination of witnesses, "it is essential that a party's case be expressly put to his opponent's material witnesses ... A failure in this respect may be treated as an abandonment of the pleaded case and if a party, in the absence of valid reasons, refrains from doing so, then he may be barred from raising it in argument. It is quite wrong to think that this rule is confined to the trial of criminal causes. It applies with equal force in the trial of civil causes as well" (*Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors & Another Appea*l [1995] 3 CLJ 639 per Gopal Sri Ram JCA). "Indeed, it behoves upon the defence to do so, for we need hardly say that if a defence is sprung for the first time when the accused makes his defence from the witness box or from the dock so that the prosecution is taken by surprise, the accused runs the risk of being criticized for having kept his defence 'up his sleeve', so to speak, and it being branded as a recent invention" (*PP v. Lin Lian Chen* @ 568 per Edgar Joseph Jr SCJ).

On the law relating to private defence, s. 96 of the Penal Code (F.M.S. Cap 45) provides that "nothing is an offence which is done in the exercise of the right of private defence". However, the burden of proof that an act was in the exercise of a right of private defence and therefore not an offence is upon an accused, as s. 105 of the Evidence Act 1950 (Act 56) provides,

> when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exceptions or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume the absence of those circumstances.

It should be noted that "the plea of private defence is one of the general exceptions set out in Chapter IV of the Penal Code, proof of which by virtue of s. 105 of the Evidence [Act] rests on the accused" (*Lee Thian Beng v. PP* [1972] 1 MLJ 248, 252 per Ong Hock Sim FJ).

The burden imposed by s. 105 cannot be anything less than proof in accordance with s. 3 (see *Jayasena v. R* [1970] 1 All ER 219, where the Privy Council rejected the contention that the meaning of "burden of proving" imposed by s. 105 of the Evidence Act of Ceylon (which is similar to the Malaysian s. 105) is merely the burden of adducing some evidence in support of the general or special exception in the Penal Code), and that "would mean that the accused in relying on any defence would have the legal burden to prove such defence on a balance of probabilities (see *Halsbury's Laws of Malaysia* Vol. 12 para 210.016).

Ratanlal & Dhirajlal's Law of Crimes 25th edn Vol 1 at p. 355 gives the following commentary on the plea of private defence.

> An accused pleading the right of self-defence has to prove it. He, however, need not prove it beyond reasonable doubt. It is enough if he established facts which on the test of preponderance of probabilities makes his defence acceptable. The right of self defence need not be specifically pleaded. A person taking the plea of the right of private defence is also not required to call evidence on his side, but he can establish that plea by reference to the circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence and not a question of the accused discharging any burden. In considering whether one is entitled to exercise the right of private defence one has to place oneself in the position of the accused in the midst of circumstances in which the accused stood and then form an opinion whether under the circumstances the accused had not the apprehension of such injuries to his body as would entitle him to exercise his right. In order to find whether a right of private defence is available to the accused, the entire incident must be examined with care and viewed in its proper setting. The injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered on the plea of self-defence. When the court feels a genuine doubt that the true picture of the incident is not presented before it without hiding anything, the benefit of that doubt is available to the accused not only in relation to the offence, but in relation to the plea of private defence or other exceptions also. Even where there is no defence evidence but from the prosecution evidence itself there is a probability of the accused having acted in self-defence or at least there is basis for a reasonable suspicion in that direction, that is sufficient to entitle the accused to an acquittal. It is not necessary nor does the law require that the accused should wait until he receives a grievous injury for the purpose of exercising his right of private defence. It is well established that a person faced with imminent peril to life and limb of himself or another, is not expected to weigh in 'golden scales' the precise force needed to repel the danger. Even if he, at the heat of the moment, carries his defence a little further than what would be necessary when calculated with precision and exactitude by

a calm and unruffled mind, the law makes due allowance for it. Since it is the apprehension of the accused which would be[82] material to sustain a plea of right of private defence, where the accused examined himself but did not utter a word about his apprehension of a grievous hurt being caused to him, plea of private defence cannot be sustained.

That the evidential burden of proving self-defence "may be discharged by any evidence in the case, whether adduced or elicited by the defence, a co-accused or the prosecution" is also a view shared by *The Modern Law of Evidence* 5th edn by Adrian Keane (see p. 87).

But that burden would be sufficiently discharged if there is a reasonable doubt as to the existence or non-existence of the circumstances supporting the particular defence (see *Othman bin Ahmad v. PP* [1970*] 2 MLJ 176, and Ikau anak Mail v. PP*[1973] 2 MLJ 153).

According to *Archbold Criminal Pleading, Evidence and Practice* 2002 at para 19-41, the classic pronouncement upon the law relating to self-defence is that of the Privy Council in *Palmer v. R* [1971] AC 814, where Lord Morris, delivering the judgment of the Board, said:

It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant action. If the attack is over and no sort of peril remains, then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may be no longer any link with a necessity of defence. Of all these matters, the good sense of the jury will be the arbiter ... If there has been an attack so that the defence is reasonably necessary, it will be, recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively... thought. necessary, that would be the most potent evidence that only reasonable defensive action had been taken ... The defence of self-defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected ...

Ong Hock Thye FJ, in *Lee Thian Beng v. PP*, briefly stated the law relating to private defence as follows:

> Turning to the plea of private defence, section 99 of the Penal Code provides that the right of private defence in case extends to the infliction of no more harm than is necessary to inflict for the purpose of defence. Subject thereto, s. 100 provides that the right of private defence extends to the voluntary causing of death or of any other harm to the assailant if the offence which occasions the exercise of the right be such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault. Section 102 provides that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body[84] arises from an attempt or threat to commit the offence; and it continues as long as such apprehension of danger to the body continues. The plea of private defence is one of the general exceptions set out in Chapter IV of the Penal Code, proof of which by virtue of section 105 of the Evidence Ordinance rests on the accused.

It was not suggested that the instant plea of private defence could be established by reference to the circumstances transpiring from the prosecution evidence itself, or that from the prosecution evidence itself there is a probability, of the accused having acted in self-defence or at least there is basis for a reasonable suspicion in that direction. It was however contended that the evidential burden upon the accused had been discharged by evidence adduced by the defence. That would be so if the defence had proved the existence of circumstances bringing the case within one of private defence, or if there is a reasonable doubt as to the existence or non-existence of the circumstances supporting private defence.

But could it be "thought that in a moment of unexpected anguish [the accused] had only done what he honestly and instinctively thought necessary"? (*Palmer v. R*). According to the accused, he was pushed ("Saya mendekati Kasim dan bercakap kepada dia, saya minta dia minum di tempat lain, kerana tempat itu adalah tempat suci". He spoke in a normal tone. He smelt liquor. Kasim straightaway pushed him on his chest), he felled back one or 2 steps, and Shekar then struck him on his right ribs with a bottle. Thereafter, according to the accused, "Simati dan Kasim memukul saya di bahagian belakang", he was kicked on his right thigh, he was punched on his face, head, neck, and back, he was on the ground and Talhah attempted to pull Kasim away but he was kicked on his head and stomach, he got onto his feet, he wanted to run to the restaurant, Shekar threw a bottle at him as he was running to the restaurant, and he avoided the bottle thrown at him. So the initial "attack", according to the accused himself, was with fists and or legs, and once with a bottle jabbed at his ribs.

As for the events that followed, according to the accused, there was a knife near the sink, he felt his life/safety was at stake, he grabbed the knife and faced Shekar, he waved the knife and said "jangan dekat, jangan dekat" ("Saya terasa diri saya terancam, saya mangambil pisau itu, saya pusing depan simati. Masa itu, pisau di tangan saya, di tangan kanan saya. Saya melambai pisau dan kata jangan dekat, jangan dekat"), Kasim proceeded nonetheless to attack him ("tetapi Kasim tetap menyerang saya"), Shekar straightaway held his hand to take the knife from him ("Shekar terus memegang tangan kanan saya, untuk mengambil pisau saya"), and he held on to the knife. So the "attack" at that moment, according to the accused, was with only hands and legs.

The "attack" could not have been with anything else. The accused admitted as much in his following testimony:

> "Waktu itu dalam keadaan tarik-menarik. Dalam proses tarik-menarik saya jatuh dan bergelut. Simati dan Kasim turut terjatuh bersama-sama saya. Saya berguling dengan simati. Saya dalam keadaan takut. Saya melihat simati berlari, dan Kasim terbaring berlumuran ... Semasa saya jatuh dalam keadaan tarik-menarik, pisau masih ada di tangan saya ... pada bila-bila masa saya tidak tikam simati. Saya pegang pisau untuk mempertahankan diri dan kerana saya rasa nyawa terancam ... Simati ganas, agresif.".

But had the defence related a story of an attack so serious that the accused was in immediate peril warranting immediate defensive action, or of an attack as may reasonably cause apprehension that death or grievous hurt would otherwise be the consequence of such attack? Was the accused in the midst of circumstances which may reasonably cause the apprehension that death or grievous injury will otherwise be the result? The testimony of the accused was that he was pushed, jabbed on his right ribs with a bottle, dipukul di bahagian belakang, kicked on his right thigh, punched on his face, head, neck, and back, and that he was kicked on his head and stomach whilst he was on the ground prior to him running to the restaurant. But that "attack" would not have been so serious and dangerous as may have put the accused in immediate peril to warrant the voluntary taking of a life. The absence of any injury on the accused affirmed that the "attack" prior to the accused taking the knife, could not have been serious and dangerous, as the accused would have been injured if it was so. Up to that point, there was no "attack" so serious and dangerous as to warrant the voluntary causing of death. Besides, the immediate moment of danger was already over when the accused had the knife, as he had extricated himself from Shekar and Kasim. However, it was the testimony of the accused that at that moment he felt his life/safety was at stake ("Saya terasa diri saya terancam ... Saya pegang pisau untuk mempertahankan diri dan kerana saya rasa nyawa terancam ... Simati ganas, agresif). But was that apprehension at that moment justifiable? There was only a minor attack before the accused took

the knife. The accused was not injured. Both Shekar and Kasim were unarmed at that point in time when the accused took the knife, according to the accused to defend himself. The accused agreed that Kasim was never armed. Shekar was also not armed at that point in time when the accused took the knife, as the bottle in Shekar's hand (SP10 agreed that Shekar had a bottle) was thrown, according to the accused at him as he was running to the restaurant. In fact, no evidence was adduced by the defence that Shekar was armed when the accused with the knife faced Shekar. Shekar might have been in an intoxicated state, but any further "attack" could not be with weapons or dangerous implements. Granted, the law does not require the accused to wait until he receives a grievous injury. But what was the immediate peril that had to be averted by the employment of force? It could not have been to avert the "attack" before the taking of the knife, as that "attack" was already over when the accused had the knife. It could only have been to avert the peril after the accused had the knife. But what was that immediate peril after the accused had the knife, if any, that was related by the accused? The testimony of the accused was as follows:

> Saya terasa diri saya terancam, saya mangambil pisau itu, saya pusing depan simati. Masa itu, pisau di tangan saya, di tangan kanan saya. Saya melambai pisau dan kata jangan dekat, jangan dekat, tetapi Kasim tetap menyerang saya. Simati terus memegang tangan kanan saya untuk mengambil pisau saya. Kasim terus memegang tangan saya dan pisau. Waktu itu dalam proses dalam keadaan tarik-menarik. Dala proses tarik-menarik saya jatuh dan bergelut. Simati dan Kasim turut terjatuh bersama-sama saya. Saya berguling dengan simati. Saya dalam keadaan takut. Saya melihat simati lari, dan Kasim terbaring berlumuran darah. Saya mengangkat Kasim. Talhah menolong saya angkat Kasim ke belakang van saya ... dalam keadaan tarik-menarik, hadapan saya adalah simati. Kasim ada di sebelah kanan simati. Dalam keadaan tarik-menarik belakang adalah tembok dan disebelah adalah sinki. Pada masa itu saya tak boleh melarikan diri ke tempat lain. Semasa saya jatuh dalam keadaan tarik-menarik, pisau masih ada di tangan saya. Pada bila bila masa saya tidak tikam simati. Saya pegang pisau untuk mempertahan diri.

Clearly all that said by the accused was that Kasim attacked him, that Shekar held or grabbed his hand to take his knife, and that thereafter Kasim too held or grabbed his hand and knife. But was the accused therefore placed in the midst of circumstances in which there was immediate peril to his life or limb? Kasim was unarmed. Kasim could only have attacked the accused, if at all, with his hands and legs. The harm inflicted by that attack with the hands and legs of Kasim could not have been serious or dangerous, as the accused was not injured. Reasonably, Kasim could only attacked with his hands and legs. Shekar was unarmed.

The evidence of the defence was that Shekar and then Kasim were then holding or grabbing the hand of the accused with the knife. The effect of the evidence of the defence was that Shekar had not attacked the accused, from the moment the accused had the knife. In truth, there was no evidence from the defence that there was any act by Shekar which may reasonably cause apprehension that death or grievous injury will otherwise be the consequence, from the moment the accused had the knife. So why was Shekar afflicted with so many knife wounds? The testimony of the accused was that he held the knife to defend himself (pada bila-bila masa saya tidak tikam simati. Saya pegang pisau untuk mempertahankan diri dan kerana nyawa terancam). But what was the specific act that may reasonably cause apprehension that death or grievous injury will otherwise be the consequence that necessitated the employment of force at the material point in time? What was the offence affecting the body? That must be revealed by the defence, as it is not possible to judge if an accused had only done what he honestly and instinctively thought necessary, without any evidence of the alleged imminent act against the body. But that evidence was not adduced by the accused or DW2. All that was said by the accused was that there was a tussle after Shekar and Kasim held his hand with the knife, that in that tussle all three felled to the ground, that he and Shekar rolled on the ground, and that thereafter Shekar ran off while Kasim laid wounded on the ground. Nothing was said by the accused or DW2 about the imminent act against the accused. Nothing was said by the accused or DW2 that the accused had defended himself. Nothing was said by the accused or DW2 about the actual stabbing incident itself. Consequently, nothing was adduced by the defence on the circumstances bringing the case within private defence.

One crucial aspect of the defence was not even compactible with private defence. The accused testified that he had not stabbed Shekar ("Pada bila bila masa saya tidak tikam simati"). DW2 testified that after the accused took a knife "semua berlaku pantas". DW2 denied that the accused had stabbed Shekar. In short, it was the unmistakable evidence of the defence that the accused had not stabbed Shekar. But it is implicit, that an accused who relies on private defence at the same time also concedes that he was responsible for the death or injury of another but "then brings evidence of circumstances which 'excuses' him (e.g., the deceased was about to attack the accused)" (see *Confession & Avoidance Defences* by TY Chin [1986] 2 MLJ lxvii, lxx). The accused did not concede that he was responsible for the injuries on Shekar. Still it was submitted that the plea of private defence had been proved.

But private defence had not been proved. There was no imminent peril to the life and limb of the accused, from the moment he had the knife. There was no offence as may reasonably cause the apprehension that death or grievous hurt will otherwise be the consequence. Shekar and Kasim were unarmed.

There was only a minor attack, if indeed there was an "attack", before the accused had the knife. Moreover, at the place where the accused said he took the knife, the accused was only 2 steps away from the backdoor of his brother's restaurant. The accused agreed that there were employees of the restaurant in the inner kitchen of the restaurant, and that there were employees and patrons of the restaurant in the dining hall of the restaurant. In other words, at the place where the accused said he took the knife, the accused was only 2 steps away from the sanctuary of his brother's restaurant and the probable shield and or protection of the employees in the inner kitchen and dining hall of his brother's restaurant, a restaurant that would not have not been familiar to him. The testimony of the accused was that as he was running to the restaurant he saw a knife in the sink, and that he took that knife to defend himself. Perhaps it could be believed that the accused, even though running to the restaurant to escape his pursuers and imminent peril to life or limb, indeed could still notice, when he was just 2 steps away from the sanctuary and protection of his brother's restaurant, that there was a knife in the sink. Perhaps it could be accepted that foolishly the accused had taken the less sensible option of taking up the knife to face his "attackers" which outcome was uncertain, instead of taking the more sensible option of continuing with his precipitous run into his brother's restaurant; after all the immediate danger was over, as the evidence of the defence was that the accused had extricated himself and was already on his way to his brother's restaurant. But the plea of private defence could not be accepted on just the bare statement of the accused that he was "attacked". The defence must prove the circumstances bringing the case within private defence. The defence must show that in a moment of unexpected anguish the accused had only done what he honestly and instinctively thought necessary. The accused had a deadly weapon, while Shekar and Kasim were unarmed. The accused had to show that no more harm than was necessary was inflicted. Yet no evidence was adduced by the defence on the circumstances that necessitated the accused to actually inflict those wounds on Shekar who was unarmed. The only possible "circumstances bringing the case within one of private defence" was the "attack" by Shekar and Kasim. But even that "attack" was not proved. To recapitulate, the testimony of the accused was that he was pushed, he was struck on his right ribs with a bottle, dipukul di bahagian belakang, he was kicked on his right thigh, he was punched on his face, head, neck, and back, and he was kicked on his head and stomach whilst he, was on the ground prior to him running to the restaurant. If that was the manner of attack, then there should be some bruises or signs of trauma on the accused when He was arrested about 3 hours after the incident. Bruises or signs of trauma on the accused on 16 May 2000 would be proof that the accused would not have not been kicked or punched. The accused agreed, that SP11 examined him when he was arrested. Reasonably, bruises or signs of trauma on the accused, especially

those on the head and face, would not have not been seen by SP11. But SP11 testified that there were no injuries I on the accused, and SP11 was not challenged by the defence; it was only put to SP11 that the accused did complain to SP11 ("tentang kecederaan yang saya alami". The accused testified that he was examined at the Muar Hospital by one Dr Lim on 17 May 2000. But that Dr Lim (not SP17) was not called to testify for the defence. But even without Dr Lim, the accused could have testified on the extent and nature of his injuries. But not a word thereto was said in evidence by the accused, or by DW2. The learned DPP made the point that the accused would have been treated if it was true that the accused was injured in the "attack". Indeed, just after he had admitted Kasim, the accused could have had himself treated at the Muar Hospital on the night of 6 May 2000. Reasonably, treatment thereat on that night would not only treat the alleged injuries but would also secure the most contemporaneous proof of the injuries. But yet the accused eschewed treatment, when he was already at the Muar Hospital, and when he could have had himself admitted, since he was still free, without the concurrence of the police. The accused proceeded instead to dispose off the knife, to change his clothing, and to lodge an exculpatory police report (P25). Reasonably, that would not have been the conduct of a person who had defended himself and had the injuries to show for it. Reasonably, an accused with injuries would have been treated. Nope, if the accused was injured, there would have been some evidence. Given the probabilities and the evidence to the contrary, the bare statement of the accused and DW2 that the accused was injured was not sufficient to prove that fact on a balance of probabilities.

With respect, it could not be thought that, in a moment of unexpected anguish the accused had only done what he honestly and instinctively thought necessary. There were no circumstances bringing the case within private defence. Shekar's death was no accident. That the accused was responsible for Shekar's wounds was proved beyond all reasonable doubt. The accused had not proved the circumstances bringing the case within private defence. No justification was shown for the exercise of private defence. But even if the "attack" was proved, the force employed was out of proportion to the necessities of the situation.

The case against the accused had been proved beyond all reasonable doubt. There is no doubt on the guilt of the accused. Accordingly, the accused was convicted on the altered charge.

"in deciding the appropriate sentence ... the first and foremost consideration is the public interest" (*R v. Kenneth John Ball* 35 Cr App R 164; see also *R v. Murukaiyan Rasoo* [1957] MLJ 26). "If the court finds the accused guilty or if a plea of guilty has been recorded and accepted the court shall pass sentence according to law. A 'sentence according to law' means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles" (*PP v.*

Jafa bin Daud [1981] 1 MLJ 315, 316 per Mohamed Azrai J, as he then was). "The first and foremost consideration of punishment is the public interest. [Because] the object of punishing crime is ... also to deter others" (*Yap Teng Chai v. PP* [1959] MLJ 205, 206; see also *Reg v. WN Hammar* [1958] 24 MLJ 4). Nonetheless in assessing sentence, all the circumstances of the offence should be considered (*Low Oi Lin v. R* [1949] MLJ 210). "The court in fixing the punishment for any particular crime, will take into consideration the nature of the offence, the circumstances in which it was committed, the degree of deliberation shown by the offender, the provocation which he received if the crime is one of violence, the antecedents of the prisoner up to the time of the sentence, his age and character" (*Mohamed Jusoh bin Abdullah & Anor v. PP* [1947] MLJ 130, citing *Halsbury's Laws of England* (Hailsam edn) Vol 9, para 365). "Courts are duty bound to consider all these matters before deciding upon a suitable sentence" (*Joginder Singh v. PP* [1984] 2 MLJ 133 per Ajaib Singh J as he then was). The sentence must be one appropriate to the gravity of the offence (*Lee Yoke Choong v. PP* [1964] MLJ 138). Accordingly, the sentence should reflect the seriousness of the offence (*PP v. Khairuddin* [1982] 1 MLJ 331). Mitigating factors are not to be disregarded, even if the offence calls for a deterrent sentence (*Lee Peng Kong v. PP* [1986] 2 CLJ 139). That is not to say however, that "the circumstances of the individual offender are more important than the protection of innocent members of the community from injury to their persons, or from risk even to their lives" (*R v Murukaiyan Rasoo*). Public interest must not be relegated to the background. "The correct approach is to strike a balance, so far as possible, between the interest of the public and the interest of the accused" (*PP v. Loo Choon Fatt* [1976] 2 MLJ 256, 258 per Hashim Yeop A Sani J, as he then was; see also *PP v. Adam bin Mohamad* [*Mallal's Digest* 4th Edn 1997 Revised para 2908] and *PP v Mohd Nooh bin Yusof & Ors* [*Malall's Digest ibid* para 2918]. "A court has the discretion to be lenient and merciful provided there are extenuating circumstances and it is in the public interest to do so" (*PP v. Khairuddin*) (emphasis added).

But there are no extenuating circumstances and it is not in the public interest to be lenient. A priceless human life has been lost as a direct consequence of the offence. The sentence must reflect the gravity of the offence. A lenient sentence will be totally out of order. Granted, the accused is a first offender. But given the gravity of the offence, that the accused is a first offender counts for little (see *PP v. Yap Huat Heng* [1985] 2 MLJ 414). On the facts and circumstances of the case, in the opinion of the court, the right and proper sentence is a term of imprisonment of eight years with effect from the date of arrest.